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Unintended Consequences

By Lowell Thomas Lunsford II

By any objective standard, it is clear that my dad, Lowell Lunsford, is the finest man in Burlington, North Carolina. No one else is even close. He has, since immigrating from Durham[1] in 1949, been perennially recognized in every local poll and by every discerning person as the best guy around. And so it was not surprising some years ago that the City Fathers, needing to infuse the board of the Federal Housing Authority in our community with a massive dose of commonsense, decency, and credibility, asked my father to serve. He agreed, and over the next several years was instrumental in turning lots of federal dollars into good affordable housing for hundreds of deserving families. When his term ultimately expired, the board wanted to honor his exemplary service in some fitting and enduring way. They decided to name a street after him. To that end, they arranged, with considerable pomp and ceremony, to designate a public thoroughfare in one of their brand-new developments as "Lowell Lunsford Drive." He felt very honored at the time. Unfortunately, circumstances soon changed. Not too long after the street was dedicated, the neighborhood began to change and the social fabric began to fray. A criminal element took up residence. In the fullness of time, quite a few of these people came to the attention of the local constabulary and were charged with crimes. This turn of events, in and of itself, was unremarkable, and maybe inevitable, given the sociological difficulties that often beset poor people who are concentrated in subsidized housing. What was particularly unsettling though, at least to fans of my dad, was the realization that the local weekly newspaper, which revels in petty crime and domestic discord, routinely publishes the names *and addresses* of all those who have been recently arrested. That being the case, it quickly became apparent to anyone with 50 cents and a passing interest in social deviance, that many, if not most, of the least reputable people in town live on Lowell Lunsford Drive. Ironically, Burlington's most honorable citizen had, through the well-intentioned efforts of his earnest admirers, become synonymous with lawlessness.

There are many moral lessons to be drawn from this story. Those who tend toward a negative world view might well conclude that the tale simply illustrates the proverb that "no good deed goes unpunished." Being more sanguine about the human condition and our fate in the hands of a beneficent providence, I am more inclined to think that there is generally a positive correlation between good intentions and acceptable outcomes. Regrettably, however, disappointments and aggravations are often the unintended consequences of a conscious effort to do the right thing. Even more regrettably, they could, in many instances, be avoided by just a little more "conscious effort."

At the State Bar, we spend a lot of our policy-making time trying to foresee adverse consequences that are not intuitive or immediately apparent. It's time and effort well spent. I am sure that the same sort of analysis is routine in our legislature, where the stakes are much higher and the cost of failing to see clearly the implications of various alternatives can be devastating. It's been my experience that clarity of forethought is most elusive when there exists total consensus regarding the ultimate policy goal. In such cases, there is a natural tendency to support an idea or initiative reflexively, just because it's been labeled by its proponents as the very thing that underlies the consensus. A good example in my world involves the concept of "professionalism." If there's one thing all lawyers can agree on, it's that our profession needs to be more professional. For that reason, we at the State Bar are constantly looking for ways to promote and manifest that increasingly scarce commodity. The problem is that not every "professionalism program" is a good program. To be perfectly honest, some of them are ill-conceived, half-baked, and not "worth the candle." Even so, they are difficult to evaluate and even more difficult to oppose. No one wants to be on the wrong side of the professionalism debate. Opposing something that has been effectively labeled as a professionalism program is virtually the same as opposing the concept of professionalism—which in the broader world is rather like coming out against motherhood, patriotism, and the public records law. There's just no percentage in it. And once a professionalism initiative is in place, it's very difficult to reform. After all, no one is keen to be seen as "compromising" or "scaling back" on professionalism.

Which brings me, inevitably, to the public records law.[2] Many years ago, the General Assembly saw fit to adopt a set of statutes that make it clear that citizens "own," have a right to examine, and are entitled to have copies of material produced or received by state government officials incident to the performance of their duties. That material, which is specified in the definition of the term "public records,"[3] includes much of the paper and digital information of which I, as the State Bar's executive director, am custodian. A good public records law is essential to good government in our democratic society, and I whole heartedly support the concept. Such legislation allows citizens to access the information they need to participate responsibly in the political process. It allows the press to do its duty in exposing waste, incompetence, and corruption. And it allows enough sunshine to penetrate back rooms,

hallways, and lobbies to discourage all but the boldest abuses of the public's trust. Still, I wish our statute, as applied, made a bit more sense.

The fundamental problem with the law is that its application is practically unrestrained. There is no reliable standard of reasonableness where demands for public records are concerned. Although the statutes do restrict access to many categories of information such as investigative files and trial preparation materials, most of the documents in my possession can be demanded by any "person" at any time for any reason or no reason at all. The requester can be a Rotarian, a reporter, an inmate, a child, a corporation, an alien, an undocumented alien, a registered sex offender, a gadfly, or a nut. It doesn't matter. The requester's motive is also immaterial. In fact, the statute plainly states that she can't be required to explain why she wants the records in question. More to the point, I suppose, is the fact that there is no evident restriction on the number of demands that can be made or on the scope of such demands. It would appear that a single individual can legitimately file a thousand requests for documents, just as a thousand individuals can each demand a single document. Indeed, anyone can, without much fear of legal contradiction, lawfully demand the production of every public record maintained by a government agency that is not specifically exempted by the statute. In fact, I am currently in possession of a perplexing request for public records that appears to seek every document produced or received by the State Bar since 2008. And, incredibly, suit has recently been filed seeking to compel production.

To be fair, there is a provision in the law[4] that requires a court to assess a reasonable attorney's fee against a person who brings an enforcement action that was filed in bad faith or was frivolous. It is not entirely clear whether the statute means precisely what it says and relates only to *the enforcement action* or whether it actually refers to the underlying public records request, but it does seem to invite some kind of judicial review of requests that are manifestly abusive. How that squares with the statutory prohibition against requiring the requester to state a motive is rather mysterious, though. And given our Supreme Court's recognition that the legislature's intent in adopting the law was to promote "liberal access" to public records,[5] it seems likely that only the most outrageous kind of harassment would ever be condemned.

Although the idea of citizens abusing their government is counterintuitive and intuitively absurd, the public records law does seem to make it possible. The costs associated with satisfying requests for records are in theory unlimited and can be astronomical—whether the accounting is done *in specie* or in kind. For an agency like the State Bar, the primary burden is usually the staff time that must be devoted not only to identifying and marshaling documents, but also to their inspection and redaction, lest confidential information be inadvertently disclosed. Unfortunately, the sort of judgments that are necessary in managing sensitive documents can't be made responsibly by just anyone. Quite often, paralegal training is required, if not a law degree. In an era where government is continually challenged to do more with less, our legal staff is spending an inordinate amount of time—and the dues paid by our member-attorneys—satisfying the curiosity of our fellow citizens. This, of course, leaves them less time to do the important work for which they were hired.

It may be, of course, that the value of transparency is worth the cost of financing an occasional fishing expedition. I am less inclined to believe, however, that parties opposed to the government in litigation ought to be able to circumvent the Rules of Civil Procedure simply by requesting information pursuant to the public records law. Surely, the General Assembly didn't have this in mind when the law was enacted. And yet, that is precisely what is happening. In addition to submitting to the orderly and reasonably well-conceived procedures prescribed by Rule 26 in pending substantive lawsuits, we are beset by discovery demands in the guise of public records requests in a parallel legal universe. Instead of a world where relevancy, need, and expense are, as a matter of course, judicially taken into account and where protective orders are obtainable as a hedge against overreaching and abuse, we find that our adversary can freely conduct discovery in a forum where protective orders are not routinely available and the judge is a stranger to the underlying substantive dispute.[6] There ought to be law against that sort of thing.

OK, I admit that this particular article is more in the nature of a rant than a dispassionate analysis of competing policies. And I have to confess that I don't come to the table with a terribly coherent set of proposed reforms. But, that withstanding, I think I deserve some credit for having the courage to point out the shortcomings of a good law that is virtually sacrosanct. Truth be told, I suspect that the folks who enacted the statute might have done things a bit differently had they known that a few people with ill but unascertainable motives might, by simply requesting some or all of their "property," seriously compromise the government's ability to function. They probably didn't imagine that the public records law would or should supplant the discovery rules in cases where the government is a party, either.

I think it might be a good idea to interpose an independent third party between the citizen and his government at the very threshold whenever a request for public records is perceived by the custodian to be ambiguous, nonsensical, duplicative, ridiculous, or tantamount to a request for discovery in a pending lawsuit, if the parties themselves can't immediately agree on a way forward. The initial reference of the matter might be to a mediator in the hope that an agreement might be thus facilitated. If there is a subsequent impasse, perhaps then a tribunal of some sort might clarify the situation and order the production of such records as the requester might be reasonably entitled to receive. Such a procedure would not involve an inquiry as to why the records are being sought, it would merely be intended to ensure on the front end that requests are comprehensible and comprehended, and that they are reasonable and bona fide. Requests that are really discovery in another pending lawsuit would be disallowed. The costs of such proceedings would be borne by the agency involved, including attorneys fees if it is determined that the government is acting in bad faith. Should the government fail to provide access or copies pursuant to the tribunal's direction in due time, the requester could still apply to the court for an order compelling production pursuant to the existing statute.[7]

As noted above in regard to professionalism programs, sacred cows are difficult to evaluate and to criticize. The public records law is a very important expression of public policy that is assumed by many to be beyond

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The Current Scope of Local Government Land-Use Regulation Powers—Have We Turned Back to the 1870s?

By G. Nicholas Herman

In the early 1800s, local governments enjoyed a broad construction of their land-use-regulation powers.[1] By the mid-1870s, however, this broad construction gave way to a highly restrictive approach known as "Dillon's Rule." Under that rule, local government powers to regulate land use were limited to those granted by the General Assembly in express words, those fairly implied in expressly granted powers, and those essential to the purposes of local government.[2]

In the early 1970s, the General Assembly replaced Dillon's Rule with a statutory rule that returned to the doctrine of broad construction. These statutes mandated that the powers granted to local governments be broadly construed and encompass any powers reasonably expedient to regulating land use,[3] including powers not specifically enumerated in the enabling statues.[4]

However, in the seminal case of *Lanvale Properties, LLC v. County of Cabarrus*,[5] the Supreme Court (in a 5-2 decision) may have turned the clock back to the 1870s to resurrect a rule of construction that closely resembles the restrictive approach of Dillon's Rule.[6] An expansive interpretation of the decision is that local governments now only have those powers that are specifically authorized by the explicit language of the enabling statutes, and that the powers explicitly conferred may only be exercised in the manner explicitly stated. Under this interpretation, local governments are now likely to be much more constrained in their ability to regulate land use, and many common types of land-use regulations may no longer be authorized.

On the other hand, a contextual interpretation of the decision is that it is confined to its basic holding—that absent specific authority from the General Assembly, a local government has no power to impose school-impact fees upon developers as a condition of development approval. Under this interpretation, local governments would continue to enjoy considerable latitude and flexibility in

enacting land-use regulations (other than for impact fees or similar exactions) so long as they fairly fall within the plain language and basic concepts of the enabling statutes.

The Court's Holding

Lanvale held that Cabarrus County had no authority under its general zoning powers to adopt an adequate public facilities ordinance (APFO) that conditioned approval of new residential projects on developers paying a voluntary fee to subsidize new school construction to prevent overcrowding in the county's public schools.[7] The decision also held that the county had no authority to condition approval of new residential developments on modifications to density, intensity, or construction timeframes for developers' projects to mitigate the effects of the new projects on existing school capacity.[8]

The APFO provided that, if the county determined that public-school facilities were inadequate to serve a proposed residential development, the county could either deny the developer's application for up to five years or until school facilities become adequate, whichever occurred earlier, or immediately approve the project subject to certain conditions that mitigated the impact of the project upon existing school capacity. These possible conditions included: (1) phasing construction in increments to coincide with available schools; (2) reducing the density or intensity of the project; or (3) entering into a consent agreement by which the developer agreed to pay a "voluntary mitigation payment" (VMP), which was used exclusively for capital improvements for school facilities.[9]

The Court held that the VMP condition was invalid absent *specific* authority from the General Assembly.[10] The Court also held invalid all of the other mitigation conditions of the APFO because they were not related to the county's authority to divide its land into districts or zones based on specific land uses.[11]

The Court's Reasoning

The Court reasoned that the zoning enabling statutes, which authorize local governments to "regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes,"[12] and the enacting of regulations that will provide for adequate public schools,[13] are unambiguous statements of local government powers.[14] Because these statutes did not *expressly* authorize the county's APFO, the ordinance was unauthorized.[15] According to the Court, there was nothing in the plain language of these statutes to authorize the APFO,[16] and its purpose and effect did not fall within the purview of the zoning statutes because the ordinance did not define the specific land uses that are permitted or prohibited within a particular zoning district.[17]

The Court also reasoned that the enabling statutes did not give the county implied authority to enact the APFO under the statutory rule of broad construction because this rule,[18] rather than being a directive, applies only when the statutes are ambiguous or when reasonably expedient to give effect to powers expressly conferred.[19] The Court concluded that because the plain language of the enabling statutes did not explicitly authorize any provision of the APFO, there was no ambiguity to trigger the statutory rule of broad construction.[20] Moreover, the VMP condition was not reasonably expedient to the exercise of the zoning power because the amount of the fees imposed was, in the Court's view, unreasonable.[21]

Interpreting the Decision Expansively

An expansive reading of the decision suggests three propositions. First, the land-use regulation powers of local governments only extend to those subjects that are *explicitly* stated by the plain words of the enabling statutes, and those powers are not independently defined by the permissible purposes of land-use regulation.[22] Second, when local governments regulate a matter explicitly stated by the enabling statutes, the regulation must be employed only in the *explicit manner* authorized. And third, the statutory rule of broad construction applies only when an explicitly stated subject matter of regulation under the enabling statutes (or an explicitly stated manner of regulation) is ambiguous, or when necessary to give effect to powers that are reasonably expedient to a local government's exercise of an explicitly stated power.[23] This approach to construing the land-use regulation powers appears as restrictive as the one prescribed in Dillon's Rule well over a century ago.[24]

If the decision stands for the foregoing propositions, many land-use regulations in common use today may now be unauthorized. For example, local governments commonly impose a variety of site-specific conditions on developments through conditional use or conditional zoning to mitigate impacts generated by the development,[25] but such conditions would only be authorized under the decision if they were explicitly stated in the enabling statutes.

Similarly, land-use ordinances commonly

contain detailed regulations about signs, landscaping, tree preservation, architectural design, driveway placement, lighting, road construction, building construction and specified materials for construction, fencing and screening, and performance standards governing noise, vibration, and glare.[26] However, none of these matters are *explicitly* listed as subjects of permissible regulation under the enabling statutes and, therefore, may now be unauthorized.[27]

Finally, although it has been previously thought that local governments have the authority to make the adequacy of public facilities a significant factor in land-use regulatory restrictions and to deny or delay development approvals that would overburden public facilities,[28] ordinances that delay development due to public-facility inadequacy without establishing a formal moratorium[29] may also be unauthorized. This is because the decision also struck down the provisions in the APFO that empowered the county to delay development approvals for up to five years or require developers to modify the density, intensity, or timing of projects in the face of existing school-facility inadequacy.

Interpreting the Decision Contextually

On the other hand, if the decision is interpreted in the context of prior precedent and its primary holding—that voluntary school-impact fees having the effect of mandatory fees are permissible only if authorized by special legislation from the General Assembly—the decision may simply be read to affirm two prior court of appeals decisions, rather than to make new pronouncements about the permissible scope of local government land-use-regulation powers. When *Lanvale* reached the Supreme Court, the court of appeals had already held in *Durham Land Owners Ass'n. v. County of Durham*[30] that mandatory school impact fees imposed on developers were unauthorized, and in *Union Land Owners Ass'n. v. County of Union*[31] that even voluntary school impact fees were invalid. The result in these decisions was arguably unremarkable because, in both cases, the counties had sought but been denied special legislation from the General Assembly to impose school impact fees, and the denial of these requests was a critical—if not dispositive—indication that the General Assembly did not intend to authorize such fees under the enabling statutes.[32]

In *Lanvale*, after the court of appeals struck down Cabarrus County's APFO in light of *Durham Land Owners* and *Union Land Owners*,[33] the Supreme Court granted discretionary review in *Lanvale* most likely because, unlike in the other cases, Cabarrus County had received from the General Assembly special legislation that the county alternatively contended authorized its APFO.[34] This issue, which the Court decided against the county on grounds that the actual wording of the special legislation did not authorize the county to adopt its APFO,[35] provided the additional occasion for the Court to affirm the holdings in *Durham Land Owners* and *Union Land Owners*, which the Court had previously declined to consider on discretionary review.

Within this context, much of the *Lanvale* decision was devoted to pointing out: (1) the earlier holdings in *Durham Land Owners* and *Union Land Owners*; (2) the fact that the General Assembly had granted special legislation to other counties (like Orange and Chatham Counties) to impose school impact fees; (3) evidence in the record of statements by various county commissioners that the VMP provision was not truly voluntary but was, effectively, a "pay-to-build system" much like the mandatory school impact fee invalidated in *Durham Land Owners*; and (4) the observation that the provisions of the APFO conflicted with our state's approach to funding public education through property taxes, special assessments, and local government sales and use taxes, where the funding burden was spread among a large number of individuals, rather than upon developers.[36] Thus, in emphasizing these points, the decision may be read as merely affirming the prior precedents of the court of appeals that school impact fees, whether mandatory *per se* or mandatory in a *de facto* way, are only authorized by special legislation from the General Assembly.

Interpreted in this context, the reasoning of the decision may not be so sweeping as to open the door to invalidate the many common types of zoning ordinances that regulate matters not explicitly stated in the enabling statutes. Instead, the Court's analysis was confined to impact fees and similar exactions imposed as conditions of development approval. Similarly, under a contextual reading, the Court refused to uphold the other conditions of the APFO for delaying projects or requiring modifications in their density or intensity only because those provisions were intertwined with the VMP provision in a way that effectively coerced developers to comply with what the Court believed was, in essence, a mandatory impact-fee system.[37] Viewing the decision in this way, common ordinance provisions today authorizing site-specific conditions to conditional use or conditional zonings or regulating matters not explicitly listed in the enabling statutes (including provisions for delaying developments or reducing their intensity or scope in the face of public-facility inadequacy) may continue to be valid if those ordinances can fairly be said, for example, to regulate the "*use* of buildings, structures, and land for trade, industry, residence, or other purposes."[38]

This contextual interpretation of the decision is also supported by its acknowledgement that local governments otherwise have "considerable latitude" and "flexibility" in enacting ordinances under the general land-use-regulation powers.[39] However, that latitude cannot be stretched to give local governments the power to enact ordinances affecting the use of real property, no matter how tenuous the connection between the ordinance and our enabling statutes.[40] Thus, the Court's pronouncement that the statutory rule of broad construction applies only when there is an ambiguity in the express language of the enabling statutes, or when necessary to give effect to powers reasonably expedient to those expressly granted simply serves as a check upon local governments from adopting whatever ordinances they want regardless of the tenuity between the regulations enacted and the plain language of those statutes.

Conclusion

Apart from its basic holding, *Lanvale* presents a tension between what it literally said and what it actually meant. Although, in most cases, the former informs the latter, here the real meaning of the decision may lie in reading what the Court said in the particular context of the actual ordinance before it. If the decision is interpreted expansively—i.e., literally—the Court's language may establish a return to the 1870s in construing the scope of local government land-use regulation powers. On the other hand, if interpreted contextually—i.e., as merely an impact-fee case—the decision may not forecast any real change in the pre-decision view that local governments generally enjoy broad

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land-use regulation powers. Undoubtedly, the true import of the decision will have to await its further application by the Court in one or more non-impact-fee cases where an ordinance is challenged as being unauthorized by the land-use regulation enabling statutes. ■

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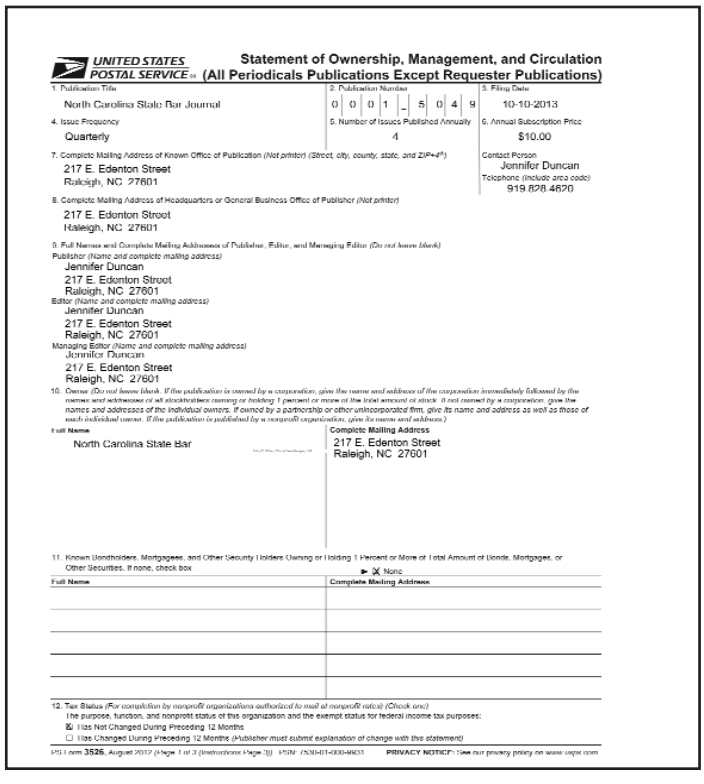
Endnotes

1. *See generally* David W. Owens, *Local Government Authority to Implement Smart Growth Programs*, 35 Wake Forest L. Rev. 671, 680 n. 47, 682 (2000).
2. *Smith v. City of Newbern*, 70 NC 14, 18 (1874). *See also* David W. Owens, *Land Use Law in North Carolina*, 22-23 (2d ed. 2011).
3. NC Gen. Stat. § 153A-4 for counties, and § 160A-4 for cities. *River Birch Assocs. v. City of Raleigh*, 326 NC *100, 109, 388 S.E.2d 538, 543 (1990); Homebuilders Ass'n. of Charlotte v. City of Charlotte*, 336 NC 37, 43-44, 442 S.E.2d 45, 50 (1994).
4. NC Gen. Stat. 153A-124 for counties, and 160A-177 for cities.
5. _____ NC ____, 731 S.E.2d 800 (2012), *reh'g denied*, 733 S.E.2d 156 (2012).
6. *See* Frayda Bluestein, *Is North Carolina a Dillon's Rule State?*, Coates' Canons: NC Local Government Law Blog (October 24, 2012).
7. 731 S.E.2d at 802.
8. 731 S.E.2d at 813.
9. 731 S.E.2d at 805.
10. 731 S.E. 2d at 815.
11. 731 S.E.2d at 813-814.
12. NC Gen. Stat. § 153A-340(a) for counties, and § 160A-381(a) for cities.
13. NC Gen. Stat. § 153A-341 for counties, and § 160A-383 for cities.
14. 731 S.E.2d at 811.
15. 731 S.E.2d at 808.
16. 731 S.E.2d at 810.
17. 731 S.E.2d at 813.
18. NC Gen. Stat. § 153A-4 for counties, and § 160A-4 for cities. *See also* the General Assembly's rule of construction that "[t]he enumeration…of specific powers to define, regulate, prohibit, or abate acts, omissions, or conditions is not exclusive." NC Gen. Stat. § 153A-124 for counties, and § 160A-177 for cities.
19. 731 S.E.2d at 809-10.
20. 731 S.E.2d at 810.
21. 731 S.E. 2d 810, n. 8.
22. *See* NC Gen. Stat. § 153A-341 for counties, and § 160A-383 for cities.
23. *See* 731 S.E. 2d 810.
24. *See* Frayda Bluestein, *Is North Carolina a Dillon's Rule State?,* Coate's Canons: NC Local Government Law Blog (October 24, 2012).
25. *See* NC Gen. Stat. § 153A-342(a) and (b) for counties, and § 160A-382(a) and (b) for cities.
26. *See* David W. Owens, *Land Use Law in North Carolina*, 46-47 (2d ed. 2011).
27. *See* James R. DeMay and James E. Scarbrough, *Lanvale Properties, LLC v. Cabarrus County—A Check on Local Government Zoning Authority,* Land Use Law Quarterly, Vol. 8, No. 2 (Zoning, Planning & Land Use Section of the NC Bar Association, December 2012).
28. David W. Owens, *Land Use Law in North Carolina*, 66 (2d ed. 2011). *See* NC Gen. Stat. § 153A-341 for counties, and § 160A-383 for cities ("Zoning regulations shall be designed to...facilitate the efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public requirements").
29. *See* NC Gen. Stat. § 153A-340(h) for counties, and § 160A-381(e) for cities.
30. 177 NC App. 629, 630 S.E.2d 200 (2006), *disc. rev. denied*, 360 NC 532, 633 S.E.2d 678 (2006).
31. 201 NC App. 374, 689 S.E.2d 504 (2009), *disc. rev. denied*, 364 NC 442, 703 S.E.2d 148 (2010).
32. *Durham Land Owners*, 177 NC App. at 631, 630 S.E.2d at 202; *Union Land Owners*, 201 NC App. at 375, 689 S.E.2d at 505.
33. 206 NC App. 761, 699 S.E.2d 139, 2010 WL 3467567 (2010) (unpublished).
34. The county also contended that the case was barred by the statute of limitations—an issue that was not presented in the *Durham Land Owners* or *Union Land Owners* cases—and the Supreme Court ultimately rejected this contention. 731 S.E.2d at 818.
35. 731 S.E.2d at 815-817.
36. 731 S.E.2d at 810-811 and 814-815.
37. 731 S.E.2d at 814.
38. NC Gen. Stat. 153A-340(a) for counties, and § 160A-381(a) for cities. (Emphasis added).
39. 731 S.E.2d at 810-811.
40. 731 S.E.2d at 811.



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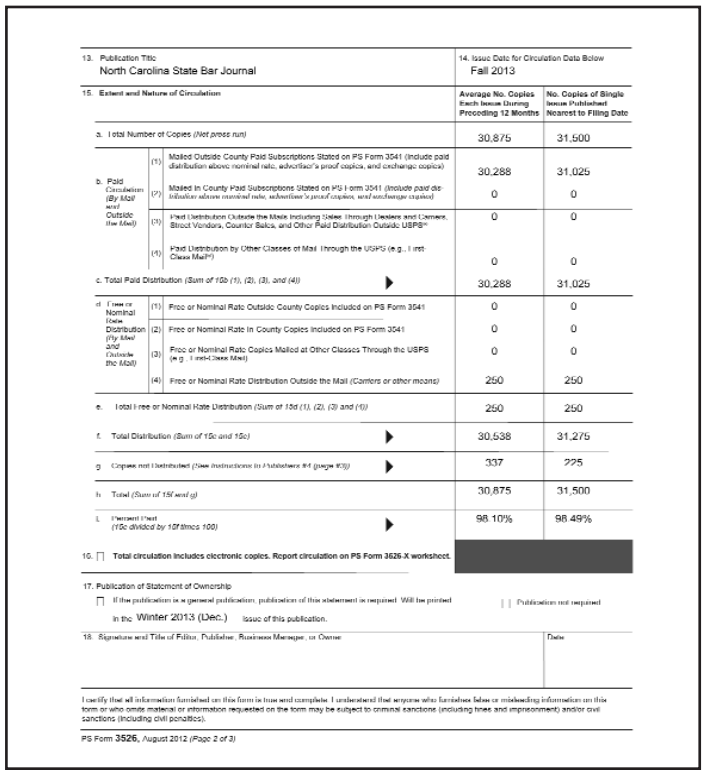

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I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

PS Form 3526, August 2012 (Page 2 of 3)

We want your fiction!

Historical Fiction *Romance*
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11th Annual Fiction Writing Competition

The Publications Committee of the *Journal* is pleased to announce that it will sponsor the 11th Annual Fiction Writing Competition in accordance with the rules set forth below. The purposes of the competition are to enhance interest in the *Journal*, to encourage writing excellence by members of the bar, and to provide an innovative vehicle for the illustration of the life and work of lawyers. If you have any questions about the contest, please contact Jennifer Duncan, Director of Communications, North Carolina State Bar, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net; 910.397-0353.

Rules for Annual Fiction Writing Competition

The following rules will govern the writing competition sponsored by the Publications Committee of the *Journal*:

1. The competition is open to any member in good standing of the North Carolina State Bar, except current members of the Publications Committee, as well as North Carolina State Bar Certified Paralegals. Authors may collaborate, but only one submission from each member will be considered.

2. Subject to the following criteria, ***the story may be on any fictional topic and may be in any form—the subject matter need not be law related)***. Among the criteria the committee will consider in judging the articles submitted are: quality of writing; creativity; extent to which the article comports with the established reputation of the *Journal*; and adherence to specified limitations on length and other competition requirements. The committee will not consider any article that, in the sole judgment of the committee, contains matter that is libelous or violates accepted community standards of good taste and decency.

3. All articles submitted to the competition become property of the North Carolina State Bar and, by submitting the article, the author warrants that all persons and events contained in the article are fictitious, that any similarity to actual persons or events is purely coincidental, and that the article has not been previously published.

4. ***Articles should not be more than 5,000 words in length*** and should be submitted in an electronic format as either a text document or a Microsoft Word document.

5. Articles will be judged without knowledge of the identity of the author's name. Each submission should include the author's State Bar or certified paralegal ID number, placed only on a separate cover sheet along with the name of the story.

6. **All submissions must be received in proper form prior to the close of business on May 30, 2014**. Submissions received after that date and time will not be considered. Please direct all questions and submissions to: Fiction Writing Competition, Jennifer Duncan, 6568 Towles Rd., Wilmington, NC, 28409, ncbar@bellsouth.net.

7. Depending on the number of submissions, the Publications Committee may elect to solicit outside assistance in reviewing the articles. The final decision, however, will be made by majority vote of the committee. Contestants will be advised of the results of the competition. Honorable mentions may be announced.

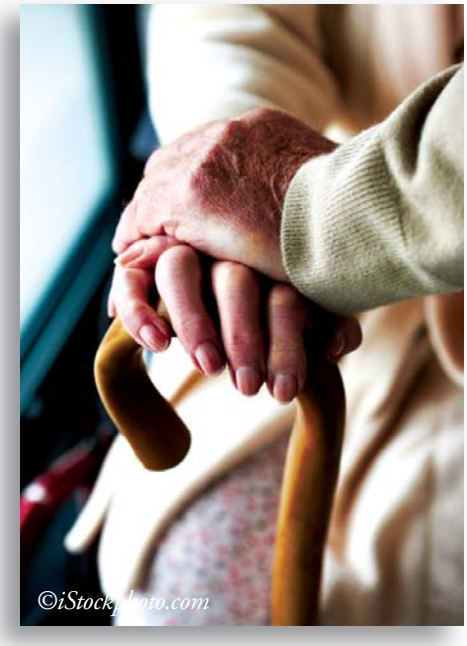
8. The winning article, if any, will be published. The committee reserves the right to edit articles and to select no winner and to publish no article from among those submitted if the submissions are deemed by the committee not to be of notable quality.

Deadline is May 30, 2014

Fraud, Vulnerability, and Aging—When Criminals Gang Up on Mom and Dad

By David Kirkman

Each spring when I was in high school, my town hosted a 25-mile charity walk-a-thon. Those of us who participated in the event found ourselves walking through almost every neighborhood in town. To take my mind off my aching, throbbing legs and feet during those day-long hikes, I counted each home or street along the way where there resided another young high school beauty for whom I held an unrequited crush. One year my final tally was something like four dozen.



Now, over 40 years later, I can drive that same walk-a-thon route and show you the homes or streets of older townspeople who have lost $10,000 to $100,000 to con artists. Their number easily exceeds the four dozen mentioned above. Several are the parents of my schoolmates. I can expand the route out to the three large retirement communities now situated on the edge of town and point out the cottages and apartments of victims who have lost between $100,000 and $250,000.

Given sufficient time to prepare, I think I could do this in your North Carolina community. Here's how.

For several years I have managed a small unit in the basement of the North Carolina Attorney General's Office known as the Elder Fraud - Prevent Re-Victimization Project. It is funded through the federal Victims of Crime Act (VOCA) and the North Carolina Governor's Crime Commission.[1] As its name and funding source imply, the project's task is to keep elderly North Carolina fraud victims from being victimized again. Repeat victimization is one of the primary features of elder fraud.

The project worked with 814 North Carolina fraud victims last year. As a group, they had lost $8.52 million prior to their involvement with the project, and they were being pressed to send the scammers an additional $1.1 million. On average, they were victimized four times. Some had lost hundreds of thousands of dollars after being defrauded dozens of times. Factoring in the refunds and charge-backs that the project was able to secure, the average loss per victim last year was $10,489.73. The good news was that only eight of those victims suffered further losses to the scammers—a total of $15,651.

The number of North Carolina victims we assisted in 2011 was 654 and their collective losses came to just over $6 million. In 2010 the number of victims we served was just over

half that amount and their collective losses were $3 million. The problem appears to be advancing at a blitzkrieg pace. Scarier still is the fact that fraud against the elderly is hugely under-reported.

The addresses of our North Carolina fraud victims reflect that no part of the state is immune. While many victims reside in cities and popular retirement communities, elderly victims from rural areas and small towns are quite common and their losses can be just as staggering. One of the half-million dollar victims we served last year resides in a rural area of Stokes County, while our state's first reported million dollar elder fraud victim, brought to our attention in July 2012, resides in a town of 25,000.

This article will discuss the victims and perpetrators of elder fraud, the features that make elder fraud so different from other forms of fraud, and some of the things lawyers can do when they spot it. It will also suggest that repeated transactions with fraud artists should be given much stronger consideration when evaluating whether an older adult is in need of protection.

Who Are These Victims?

It is often said that today's seniors fall prey to con artists because they grew up during a simpler, more trusting time. That means that the elder fraud phenomenon will disappear as the World War II/Korean War generation passes on, right?

Wrong. Practically every one of the elderly fraud victims I have encountered during the past two decades made their marks in no-nonsense professions where skepticism is a key survival tool. Most tended to be anything but "kind" or "trusting" when I tried to convince them they were being scammed.

Something in the here and now, rather than the era in which they grew up, makes these victims so vulnerable. One of the saddest aspects of our job is the news conveyed a few years after we started working with them: "Dad was diagnosed with Alzheimer's disease today" or "They now say that mom has vascular dementia." When the sweepstakes scammers began preying upon him five years earlier, dad might have exhibited impaired judgment or obsessive conduct by repeatedly buying into their representations, but the cognitive assessment we recommended the family obtain from a physician back then resulted in a diagnosis that dad's cognitive abilities were "normal for his age."

Meet the Scammers

The elder fraud industry is diverse and global in nature. Components of it include North American motorcycle gangs, mobsters from the former Soviet Union, Caribbean criminal gangs, and groups from the Middle East, South Asia, and western Africa. Good ol' boys from Nash and Edgecombe Counties are notorious members of it, as well. The western US is home to several groups of online fraud artists who successfully target seniors with home-based internet marketing programs. They claim their $3,500 programs will earn seniors hundreds of thousands each year. Within a few weeks, however, the senior loses up to $40,000 through expensive add-ons to the program that they never ordered, and unauthorized debits to their bank accounts.

According to a recent study, during routine office visits, general practice medical professionals miss the fact that an older patient is in the early stages of Alzheimer's disease 50 - 60% of the time.[2] Members of the elder fraud industry, however—many of whom possess limited educations—easily spot and exploit the early stages of Alzheimer's and similar conditions. They can even do it from cyber cafés or apartments in places like Madrid, Spain, Delhi, India, or rural Jamaica.

The broad array of scams that the elder fraud industry runs on our parents and grandparents is set forth in a 20-page publication available online from the North Carolina Attorney General's Office entitled *Scams & Fraud; Protect Yourself - Don't Be A Target.*[3] Some of the listed fraud categories, such as Telephone Fraud, Sweetheart Scams, Overseas Money Transfers, and Home Repair Fraud, involve repeat victimization that can persist for months and years—or until the victim's savings are exhausted.

"Reloading"—The Key to Repeat Victimization

Being scammed once has nothing to do with age. Being scammed repeatedly certainly seems to.

A fraud artist who made his fortune scamming older people over the phone once told a congressional committee, "I didn't want the one-time (victim). I didn't want the two-timer. I wanted to sell these people ten times."[4] Professor Richard M. Titus, who has studied victims of elder fraud, has observed, "It appears that one of the surest ways to become a personal fraud victim is to have been a victim."[5]

The question is, what makes repeat victimization of older consumers so common and so easy?

The New Rule of 78s

Age-related cognitive decline will confront each of us if we live long enough. It can be very subtle in its onset. Difficulty in managing financial tasks can be one of the first signs that age related cognitive decline is accelerating. It is startling to consider the percentage of older Americans who are experiencing the symptoms of just one age-related condition that impacts cognitive functioning—Alzheimer's disease. At age 65 it is 10%. At age 78 it is 24%. By age 84 it rises to 45%.[6] Considering the fact that Americans age 65 and older control $15 trillion in assets,[7] it is no surprise that a multi-billion dollar elder fraud industry has formed and is targeting them.

Older attorneys may recall an old, discredited formula for calculating the yearly interest on an installment loan, The Rule of 78s.[8] The elder fraud industry has its own Rule of 78s. They deliberately target people age 78 and older because they know this age group includes enormous numbers of individuals who still live independently yet are experiencing some form of cognitive impairment. Over the internet and from legitimate lead list companies, they order the names and contact information of Americans age 78 and older who live independently, have a certain amount of income and, perhaps, enjoy activities such as sweepstakes or lotteries. Even Fortune 500 companies have been identified as selling this information.[9]

The scammers winnow these lists down as they communicate with the listed individuals and discover whether they have substantial assets; certain tendencies, passions, or fears; and, of course, age-related vulnerabilities to exploit. "Profiling" is another word for it.

Age-Related Vulnerabilities to Fraud

Persons preyed upon by the elder fraud industry often have two or more of the following age-related vulnerabilities:[10]

1. A fixed—perhaps inadequate—retirement income and a strong desire to make it grow.

2. Good credit, quick access to their retirement savings, or 100% equity in their home.

3. Depression.

4. Physical or emotional isolation and lack a personal support network.

5. Loneliness from the loss of a spouse or

other loved ones.

6. A strong desire to be a decision maker or go-to person once again.

7. Difficulty in controlling obsessions.

8. Fear of a loss of independence, especially the ability to live in one's own home.

9. Limited sight, hearing, and/or mobility.

10. The effects of medications.

11. Age-related cognitive impairments.

These age-related vulnerabilities range from those that are situational—such as a desire to make important decisions once again or personal desperation over a limited income—to those that are related entirely to physiology. Depression, which is more common in older adults, can be either situational or physiological.

With respect to item 11, the impairments experienced by people in the 78-plus age group include short-term memory problems, flawed judgment in excited situations, and diminished ability to process information quickly. A person who is experiencing such problems can still make the proper judgment or process the information that is coming to him, but not as quickly as before. It can be likened to having a slightly older computer. The computer can process the information and operate many of the same programs as a newer one, but each task might require more time. One can see this processing phenomenon at work when watching certain older drivers make their way to their destinations. When scammers spot the phenomenon, they pounce.

Scientists have been analyzing these age-related vulnerabilities and the financially risky behaviors that accompany them. One study suggests that the legendary frugality and financial conservatism with which Depression Era Americans handle their personal finances mysteriously shifts with age to a more risk-friendly financial philosophy.[11] Another found that older consumers start to look for the telltale signs that a pitch is legitimate rather than searching for signs that it is a scam like younger consumers do.[12] Two intriguing scientific studies involving brain imaging were released in 2012. One of them suggested that some older individuals suffer losses of function in the ventromedial prefrontal cortex, a lobe of the brain that controls credulity, while the other suggested that elderly scam victims may have experienced damage to or deterioration of the anterior insula, a specialized lobe of the brain that helps them to recognize dangerous situations or untrustworthy individuals (i.e., "gut instincts").[13]

Scam Techniques that Exploit These Vulnerabilities

The exploitation of multiple vulnerabilities is most evident in three very popular fraud schemes: home repair, overseas prize contests, and sweetheart scams. Each one involves the development of a compelling narrative that becomes an obsession for the victim, a series of exciting or alarming representations, overloading the victim with facts, procedures and very short deadlines, and, in the later stages of the series of scams, panic and desperation.

Techniques of the Rocky Mount Home Repair Fraud Group

With home repair fraud, the alarming initial representation might be that the victim's chimney is leaking water or pulling away from the house and needs to be fixed right away. Once the pretend repair is performed and the victim pays thousands of dollars, the scammer suggests that rain water might have entered the house through the sides or the base of the chimney and caused damage to the roof decking. Sure enough, after inspecting the roof, the scammer tells the homeowner that the wood below the shingles is completely rotted and needs to be repaired. To heighten the alarm felt by the homeowner at this moment, he might pull a handful of garden mulch out of his pocket and say, "This is wood from your roof. It's so rotten that my leg went right through it. It's going to collapse any day now. Plus the county building inspector is right down the street and might condemn your house and evict you if he spots the hole my leg put in your roof!"

After collecting $15,000 for "rebuilding the roof" (applying an unnecessary layer of cheap shingles and nothing else), the scammer advises that expensive repairs and toxic mold abatement needs to be done in the attic immediately. Again, water intrusion near the chimney is the culprit. After collecting another $8,000 to $15,000, the series of alarming reports continues unabated. They involve water damage to the exterior walls, interior walls, sub-flooring, and foundation of the home—areas of the house that the elderly home owner no longer can visit or see. Repair costs at each juncture again range from $8,000 to $15,000, depending on how much the scammers think they can extract from the victim. Each one of these reports might be accompanied by false claims of toxic mold that must be treated right away for an additional $5,000 to $10,000, or else the house might need to be condemned. The homeowner might also be told to move into a hotel immediately for health reasons if repairs cannot be started that very moment.

With these carefully crafted images of pervasive water damage, toxic mold, building inspectors coming up the street, and possible loss of the home deeply embedded in the victim's mind, the scammer can get authorization for whatever additional repairs he can think up. If the victim balks, he simply claims that the entire home might be lost, along with the $90,000 in repairs that were just put into it. He might even strike below the belt and suggest that the homeowner's adult children might seize control over the homeowner's finances if they discover the house in its current state.

Scammers Become the Victim's Support Network

The crews also strive to develop close friendships with their victims during these iterations of the scam. They run errands for them, talk with them at length about their lives, careers, and families, bring them presents on their birthdays, and occasionally offer huge discounts on the supposed repairs just because the homeowner has become "like an aunt or uncle" to them. They tell the homeowner that by authorizing the repair he or she will be saving the family home for future generations and completing a major transaction that his children probably do not think he is capable of handling.

Up to Eight Vulnerabilities Exploited

The age-related vulnerabilities that have been repeatedly taxed or exploited in the above scenario include: 1) impaired judgment in excited or disturbing situations; 2) inability to process large amounts of information as quickly as before; 3) problems with controlling obsessions—in this case a fabricated obsession about water damage destroying the home; 4) visual and physical impairments that keep them from spotting the fact that no real work is being done; and 5) a need to feel important and in control of major decisions once again. With the errands, presents, and the lengthy conversations, they are trying to tap into the victims' loneliness if the victim, in fact, suffers from that sixth vulnerability. Another thing that the scammers are doing when they tell the victims not to dis-

cuss the repairs with their adult children (lest they intervene and take over control of the house) is isolating them from their main support network. That isolation would be a newly created seventh vulnerability. The fact that the victims have sufficient savings or home equity to finance all these transactions is yet another vulnerability that younger consumers rarely possess.

"Recovery Scams"

The repeat victimization does not stop at this point. In what is known as a "recovery scam," another home repair crew will show up and report that the "warranty company" sent them to inspect all the work. Sure enough, all the work turns out to be faulty and the water intrusion and resulting toxic mold will continue to put the house at risk of collapse or condemnation. Everything will have to be redone, plus the victims will need to move into a hotel if the repairs are not started today. Of course, the repairs will be even more expensive this go-round, since the previous, defective repairs will need to be undone. The homeowner is told that only he or she can prevent calamity, and that authorizing the repairs is the best way to document what the "scammers" did. Once all that is done, the homeowner will be in a position to sue the earlier crew for recovery of all the money, plus prosecute them in the criminal courts and thereby keep other homeowners from being similarly exploited. You can see many of the same vulnerabilities being exploited in this phase of the repeat victimization, which can ratchet the victim's losses up into the $200,000 to $300,000 range.

Lottery and Sweepstakes Scammers Do Likewise

With the lottery and sweepstakes scams, the re-victimization sequence is as follows. First, the target is contacted and congratulated for winning second place in the (name a country) lottery, told she will receive $5 million via FedEx tomorrow, then told to wire several thousand dollars overseas today to cover a deposit on foreign income taxes on the prize, otherwise they will be disqualified. The instant the money has been wired from the Western Union or MoneyGram terminal at the victim's grocery store, the victim is contacted and told that the grand prize winner has been disqualified, that she has moved up into that position, and that she should wire double the amount that was wired earlier, and do it by tonight, if they wish to triple the amount of their prize to $15 million. A US Customs agent calls the next day and orders that several thousand dollars in customs duties on the prize be wired by that night, otherwise the prize will be forfeited back to the national sweepstakes that issued it. A Lloyds of London representative calls next and says that the delivery of the prize must be insured and that the required premium must be wired to London within two hours, otherwise the prize will be nullified. A Department of Homeland Security representative then calls and maintains that the transaction looks suspicious, that it needs to be audited, and that the victim should send $20,000 immediately via bank-to-bank wire transfer to cover "terrorism audit fees." In a "recovery phase" similar to the one in the home repair scenario, above, a supposed lawyer based overseas calls and says he has put an asset freeze on the sweepstakes company, that they were running a scam, and that the prize and all the victim's previous money transfers can still be redeemed if the victim is willing to wire thousands of dollars to cover his fee, the foreign income taxes, customs duties, etc.

In each iteration of the sweepstakes and lottery scams, the victims are bombarded with instructions on where and how to wire the money, what transaction numbers they should write down, what security question and answer to use, what phone number to call when they have made the next wire transfer, how no one should be told about the transaction lest the tax-free nature of the award be jeopardized. They are given codes and badge numbers and names to write down. The callers, of course, are speaking a mile a minute and the victims cannot keep up.

You can surmise which age related vulnerabilities are being taxed by these cross-border scammers. There are at least seven of them.

Cruelest of Them All – Sweetheart Scammers

The cruelest of the elder fraud criminals are those who run sweetheart scams. They lurk on internet sites where older people meet and socialize online. Once they spot their prey, they pretend to strike up an internet friendship with that person, which soon becomes a romance, which eventually turns into a marriage proposal.

The sweetheart scammers typically pose as western business people who are working on expensive projects overseas. Once their phony romance is off and running, the gripping drama begins. The scammers tell their newfound loves that they are experiencing temporary financial problems with their businesses, which might bankrupt them, or that they have been sent to jail or to the hospital and are in desperate need of a loan. They repeatedly implore their victims to save the day by wiring enormous sums of money, and they promise to send it back just as soon as their financial, medical, or legal crises are resolved. They also promise to come to North Carolina and marry their victims the moment those problems are in the past.

The victims, of course, view themselves not as victims but as heroes or heroines in a gripping and romantic drama that spans various continents.

In 2011 and 2012 the Elder Fraud Project saw this scam explode, with losses per victim often in the six figure range. Four times during that interval, our staff dealt with victims who had just boarded overseas flights in order to take cash to their "fiancées."

The $1 million victim mentioned above was taken by a sweetheart scammer. She was a retired bank executive who once handled major financial transactions. He claimed to be a soon-to-be retired construction company owner who was completing an enormous project in Nigeria.

Quick Lesson from Percy Sledge

Seldom in the elder fraud world are more of these vulnerabilities and fraud techniques at play than in the sweetheart scam. Obsession, enduring imagery, alarming statements, inability to process all the information that is coming in, relieving depression, securing one's financial security down the road, feelings of being the go-to person again—they are all there. The scam also features its own victim isolation mechanism that foils friends or relatives who might try and intervene. Singer Percy Sledge once described it as follows:

> *When a man loves a woman,*
> *He can't keep his mind on nothing else.*
> *He'll trade the world for the good thing he's found.*
> *If she is bad, he can't see it, she can do no wrong.*
> *Turn his back on his best friend if he puts her down.*[14]

Convincing someone that they are the victim of an ongoing sweetheart scam can be next to impossible. If your counseling skills are not up to the task, additional forms of intervention, discussed below, might be required.

Practice Tips for Assisting Targeted Clients

1. Reduce unwanted mailings by putting the client on the Direct Marketing Association's mail preference list. *See* dmachoice.org.

2. Have the repeat victim's mail redirected to a family member who will screen out suspicious mailings, then deliver the remainder.

3. Reduce mailings pertaining to credit offers by enrolling the client in the national credit bureaus' Opt Out program—888-567-8688, optoutprescreen.com

4. Have the client contact one of the major credit reporting services to place a fraud alert on his or her credit file if he or she responded to a suspicious offer by disclosing sensitive information—equifax.com, experian.com, or transunion.com.

5. Advise a client to secure a "freeze"on their credit bureau information if they become targets of identity thieves or if they have no further need for new credit. *See* NC Gen. Stat.§ 75-63 and ncdoj.gov/Protect-Yourself.

6. Call the Consumer Protection Division and obtain an Identity Theft Victim Kit if scammers are actively using the client's identity and financial information—877-5-NOSCAM, 919-716-6000.

7. Ask the attorney general to secure blocks on Western Union or MoneyGram wire transfers by the client if he or she has used either of those companies to send funds to the scammers. Both companies have agreements with the attorney general permitting this. Make this request through the author, dkirkman@ncdoj.gov, 919-716-6033.

8. If the scammers successfully debit the client's checking or credit card account with fraudulent or fraud induced debits (ACH electronic debits or unsigned paper demand drafts, a/k/a remotely created checks), assist him or her in getting the debit removed and recoursed to the scammers' merchant bank or payment processor. Have the client or the bank close the account. Ensure that the matter is treated as a fraudulent charge or a fraud-induced charge rather than a billing error. Help the client execute a fraud affidavit for the bank.

9. If possible, get the client to change to an unlisted phone number and caution him or her against placing the new number on any sweepstakes, return mailing, survey, or other form. This can be hard to do. Many victims have had the same phone number for decades and are likely to worry that their families and friends will not be able to reach them if it is changed. Equating the phone number to a credit card number that has been compromised by scam artists and needs to be changed by the bank is one tactic that the Elder Fraud Project has employed with some success.

10. Ensure that the client's personal computer possesses good security software and a powerful spam filter. Check the email directory and add existing yet problematic email correspondents to the "blocked senders" list. Consider changing the client's email address if the old one is being employed by fraud artists. If the client is on Facebook, help him or her to set their privacy settings so that only friends can see their posts.

11. For home repair fraud victims, encourage the victim's family, congregation, or friends to visit the victim regularly and often. The scammers will stay away if this happens. Also, contact local law enforcement and building inspections officials if they return.

12. Use the situation to discuss durable powers of attorney and advance directives, since the experiences and behaviors of the client may suggest the need for such documents in the coming years.

13. If your client is a business whose employees have spotted the financial exploitation of a "disabled adult," have them report the matter to the adult protective services of the County Department of Social Services. *See* NC Gen. Stat. § 108A-101, *et seq*. Scams in progress should be reported to local law enforcement (e.g., home repair fraud) or the Attorney General (cross-border fraud, telemarketing fraud), 919-716-6033, as appropriate.

14. If representing the family of a victim whose interactions with the scammers persist despite all other efforts, discuss the initiation of proceedings to appoint a financial guardian. Make sure that the clerk of court and any physician who conducts a cognitive assessment of the fraud victim are both fully aware of the victim's dealings with and reactions to the scammers.

Get the Victim Out of Harm's Way

Lawyers are among the few professionals with whom repeat elder fraud victims will discuss such events, perhaps because victims know that comments made to a lawyer will be kept confidential. The victims might also think that the lawyer is the only professional who can walk them through the confusing array of representations that the scammers have made about taxes on prizes, customs duties, terrorism audits, international wire transfers, receiverships, remarriage, or obtaining a visa to visit Ghana or Moldova. Sometimes the lawyer might be approached by family members who have spotted the scams. Counsel for banks or private businesses might be contacted by alarmed employees who have spotted the scam. There are three key things to remember when confronted with such situations: (1) maintain and enhance the victim's self-esteem, (2) know that the scammers will try again; and (3) try and get the victim out of harm's way.

Victim Counseling – Yes it Can Work

Upon hearing that an older client, customer, or loved one has fallen prey to such scams, the way that one reacts is terribly important. The wrong response can send the victim right back into the clutches of the scammers. Dr. Anthony Pratkanis of the University of California at Santa Cruz studies such victims closely. He notes that people subconsciously tend to go with the person who is telling them they are doing the right thing (and that their course of action will produce great rewards) rather than the party whose comments suggest their actions are wrong and costly and reflect, perhaps, a need to take away their freedoms. He calls this "psychological reactance."[15] In this scenario, the scammers take on the mantle of hope, success, productivity, and competency while you or the family member will occupy the position representing failure, humiliation, financial loss, and incompetency. Pratkanis notes, "People naturally go with the one who is saying the former rather than the latter. Who wants to agree with the guy who says you have made an expensive mistake and should have your freedoms curtailed?"[16]

When one first discusses such a problem with a victim, carefully crafted comments are imperative: "Many very bright individuals just like you are taken by people who do these sorts of things. They are extremely convincing and skillful at what they do. Perhaps you and

I can help protect others from them." With such an approach you have downplayed the financial loss, reaffirmed that the client or loved one remains bright and has nothing to feel bad about, and enlisted him or her in the noble task of helping others avoid losses. You have just negated much of the advantage that the scammers worked hard to establish.

If you are advising bank personnel, company employees, or a victim's family, ask them to keep these principles in mind. There is nothing more counterproductive than the reaction, "Oh my god, Dad! I can't believe what you did! You got scammed out of so much money!" Dad will want to get right back on the phone with his friends from Jamaica or the Ukraine who are telling him that he is "the man," that he is going to be rich, and that he is going to prove the hyper-critical kids or meddlesome bankers wrong if he just continues on with the transactions.

The Attorney General Cooper's Senior Frauds List was designed in part to be a tool for initiating discussions with victims. It is comprehensive, non-judgmental, and printed on the letterhead of the state's chief consumer protection official. It reflects that numerous people have experienced the same thing—a message that deflates a lot of defensiveness or embarrassment that keeps the victim from opening up. It describes scam techniques that victims can recognize from their own experiences, and they will discuss them with you. It also represents a vehicle for getting the victim to speak with professionals in the Attorney General's Office who are trained to counsel and assist elderly repeat victims of these types of scams.

Your counseling of the victim probably will need to be a sustained and long-term project. The scammers won't let go of a victim without a fight. You might need to incorporate other people and other techniques into your efforts, as well.

MoneyGram and Western Union Wire Transfer Cut-Offs

The best tactic for getting victims out of harm's way is to sever their financial links with the criminals. While it is next to impossible to get one of these victims to stop talking with the scammers on the phone or responding to their letters and emails, if you can stop the flow of money, the scammers will move on.

Well over half of the $8.5 million in losses mentioned in the early paragraphs of this article went to the criminals via Western Union or MoneyGram wire transfers. Attorney General Roy Cooper has negotiated agreements with both MonyGram and Western Union whereby they will interdict all wire transfers by a North Carolina citizen if the attorney general so requests and certifies that the person is an older adult who has been targeted successfully by fraud groups. The process is simple and usually completed via email. If you have a client who might be served by such a request, contact the author of this article by phone, 919-716-6033, or by email, dkirkman@ncdoj.gov. If you are counseling a family that is struggling with a parent who has wired funds to scammers, please have them call Attorney General Roy Cooper's Consumer Protection Division at 919-716-6000 and ask to speak with one of the elder fraud duty agents.

Cockroaches Flee when the Light Goes On

Home repair scammers have a lot in common with cockroaches. Cockroaches will flee when the lights come on. Home repair scammers will get in their trucks and drive off whenever a police officer, code official, friend, or family member pulls into the driveway. If this happens repeatedly and at unpredictable intervals, they will consider the job "blown" and leave the elderly victim alone. They will also leave a victim alone if his or her bank starts questioning the checks they are presenting or if bank personnel call the police. Getting some or all of these parties to insert themselves into the picture will soon break the repeat victimization cycle in a home repair fraud situation.

If your client is a financial institution, please be aware of Senate Bill 140,[17] which was enacted by the General Assembly in August. It makes clear that banks and their employees can and should contact Adult Protective Services officials and appropriate state and local law enforcement agencies when they suspect that a customer 65 years or older is being defrauded. It provides a safe harbor for bankers who report suspected home repair fraud to local police or cross-border scams to the attorney general.

"They are Still Competent. They Can Spend Their Money as They Wish."

Families often report to our Elder Fraud Project staff that doctors, local clerks of court, and local adult protective services officials do not view their older loved one's repeated, almost obsessive dealings with fraud artists as grounds for curtailing their ability to control their finances. Many of those professionals contend that the elderly repeat fraud victim is not a "disabled adult" for purposes of NC Gen. Stat. § 108A-101(e). After all, the victims can still drive, prepare meals, balance their check books, initiate wire transfers, etc. There are, however, growing numbers of doctors, clerks of court, and APS officials in North Carolina who recognize that the types of risky financial dealings these repeat victims engage in are clear signs of accelerated age-related cognitive decline that requires some sort of legal intervention, such as a financial guardianship. Medical science supports this position.

Financial capacity is the ability to manage our financial affairs independently and in a manner consistent with our self-interest.[18] Financial decision making is one of the most challenging, multi-dimensional mental activities we engage in. As to the seriousness of what might be at play when an older client, customer, or loved one repeatedly engages in the activities described above, please consider this recent medical finding: declining financial skills are detectable in those with a diagnosis of mild cognitive impairment in the year before they convert to Alzheimer's disease.[19]

Conclusion

The fact that an older individual has been targeted successfully by scammers does not always mean that he lacks capacity to handle his affairs. Repeat victimization that cannot be stopped, however, suggests the need for proactive intervention, whether it is concentrated and sustained counseling of the client, wire transfer cut-offs, or the initiation of financial guardianship proceedings. ■

David Kirkman, a 1979 graduate of UNC School of Law, is a special deputy attorney general in the Consumer Protection Division of the North Carolina Department of Justice, where he has worked for 26 years.

Endnotes

1. NC Governor's Crime Commission Grant Nos. PROJ00866, PROJ008154, PROJ009450 (Renewed 2013 through 2015).
2. Solomon PR, Murphy CA, Expert Rev. Neurotherapeutics 8(5), 768-780 (2008).
3. ncdoj.gov/getdoc/36361c24-c88f-4ee5-a9ad-4ab04ee5c612/Revised-Consumer-Scams-booklet-10-2011.aspx; Last visited 1-14-13.

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Blair Berk Profile

By Ashley M. London

When Hollywood's A-list talents find themselves in legal predicaments or embroiled in litigation with aggressive paparazzi, they call powerhouse Los Angeles-based defense attorney and North Carolina native Blair Berk for help.

"Once a Tar Heel, always a Tar Heel," says Berk, in her subtle lilting accent. "We love coming home. It's startling how much things are changing in North Carolina, and we are proud of it."

Although she won't admit it, Berk is as popular and well-known as the celebrity clients she represents. A partner at Tarlow & Berk, PC, her office is located off the iconic Sunset Strip in Los Angeles, California. She appears in articles and has been featured in publications as varied as *The New York Times, The Washington Post, Variety, Larry King Live, Crossfire,* and even *TMZ*.

"I spend most of my time trying to limit the amount of press in my cases because my view is that less is more," Berk says. "A lot of focus on the criminal lawyer compromises the lawyer's ability to be great in the courtroom because people stop listening to the merits of your argument and focus too much on seeing you on TV."

Limiting press exposure isn't a case of Berk sticking her head in the sand, however. She is on the phone every day with reporters across the country speaking on background to clarify, but not to go on the record for attribution. Berk says she is dismayed at the enormous amount of laziness and the bad reporting from many news outlets today. Berk says a story must be accurate because it can have an enormous impact in the court of public opinion, which is very important to Berk's clients.

Berk is the daughter of prominent North Carolina attorneys Steven Bernholz and Dorothy Cochrane Bernholz. Her father is a well-known criminal defense practitioner and her mother founded the University of North Carolina's Student Legal Services Program. Both are still in practice today.

"As a criminal defense lawyer, you basically represent people who trip and fall down," says Berk. "Most of my clients trip and fall on occasion like everyone else, but the difference is that everyone is staring at my clients when it happens—and they secretly enjoy watching them fall."

Berk politely, but firmly, declines to reveal the names of her clients, saying that they rely on her to maintain a high level of discretion. But public record reveals that she has been connected with the representation of celebrities such as John "Ozzy" Osbourne, Lindsay Lohan, Kanye West, Mel Gibson, Keifer Sutherland, Gerard Butler, and Reese Witherspoon.

The Harvard Law graduate specializes in representing individuals and companies in the entertainment industry, including those facing criminal prosecution or indirectly involved in criminal matters. Berk has represented clients in a broad range of cases including alleged conspiracies, sexual assault, drug possession, homicide, stalking, RICO, regulatory and health care fraud, and money laundering. Berk graduated *summa cum laude* from Boston University with a Bachelor of Arts and a Masters Degree in Political Theory, and was selected as a member of Phi Beta Kappa, prior to attending Harvard and studying under respected Professors Laurence Tribe and Alan Dershowitz.

"In the criminal justice system, there is an urban myth that celebrities are treated more favorably when the truth is that they are treated less favorably," Berk says. "Prosecutors, judges, and law enforcement are so terrified that someone will accuse them of favoritism. My role is at least to try to get us back to a level playing field before we start the case."

She candidly reports that her practice is seeing a lot more cases involving high-profile clients due to the increase in intrusive contact by members of the paparazzi as well as an increase in stalking cases as the personal lives of her clients are more easily accessible to the public through magazines or other media sources. Berk also handles plenty of fabricated cases where dishonest people are simply seeking to make a quick buck off of a celebrity case.

"It's no longer worth very much to take a photo of a famous person smiling while coming out of a movie theater, so more and more paparazzi are provoking incidents by putting their hands on someone's child, for example," Berk says. "It is not enough to say, well, they wanted to be famous so this is what you get. I don't think bringing danger

to someone's family or physical dangers to themselves is part of that social contract. That's not a fair bargain."

Berk received the gifts of critical thinking and a love for the law at an early age from both of her parents. Dinner table discussions were never run-of-the-mill chats involving day-to-day activities.

"We loved our advocacy—me for students' rights and Steve for the presumption of innocence in defending his criminal practice clients—so we brought our issues home for family discussions," says Ms. Bernholz, who knew her daughter was destined to become an attorney at age four when she first bested her dad in a logical argument.

Berk says she knew from an early age that she was going to grow up to be a criminal defense attorney just like her dad, even though it was a challenging prospect and not a lot of encouragement was offered to a woman who wanted to pursue a criminal defense career. Berk says she draws on the strengths shown by both parents. Her dad always displayed a strong loyalty to his clients—whether they were rich or poor, powerful or powerless. Berk says her mother really cared about finding creative alternatives to solving problems and instilled in her a deep respect for the constitution and civil liberties.

"It's pretty profound to watch someone help another human being and actually protect their liberty so they can go home to their family," Berk says. "I saw how both of my parents in their own legal practices made such a difference and how life changing that can be."

Berk says she had to resist incredible pressure placed on her by her peers and mentors in order to pursue her dream. It was almost expected that as a Harvard grad she would become a federal prosecutor or go into investment banking or mergers and acquisitions at a white collar firm in New York City. While Berk's parents encouraged her to pursue something she was passionate about, Berk jokes that they would have preferred that she become a jazz pianist.

"I was told that the last thing I should consider would be to join a small law firm and become a criminal defense attorney, that it would be career suicide for an Ivy League attorney, and that I would never achieve anything," Berk says. "I think a lot of attorneys missed out on a higher quality of life because they were forced into expected slots that had nothing to do with what interested them."

Berk defied all expectations when she eschewed working at any of the tony New York law firms she had apprenticed with during law school, and left the now-dissolved Los Angeles criminal defense firm Wyman, Bautzer, Kuchel & Silbert, to join forces with her current partner Barry Tarlow. Tarlow, who made a name for himself defending racketeering and RICO cases, took Berk under his wing and never expected her to carry his bags for the rest of her career. He encouraged her to develop her own practice and identity as an attorney.

"Criminal defense historically has consisted of a bunch of cowboys, or cowboy stereotypes," Berk says. "Lots of lone guns for hire who are such egomaniacs themselves that they can't tolerate other competitors. While Barry is a legendary lawyer, he has no ego when it comes to mentoring."

Tarlow still practices with Berk along with three other associates. But don't try to Google Tarlow & Berk, PC. The firm is aggressively anti-marketing and doesn't even maintain a website. Although she has been in practice now for 20 years, Berk prefers to fly under the radar. Even after decades in the business, Berk says she remains astounded that there aren't more women in the criminal defense bar even as women have made great inroads into the ranks of prosecutors and judges.

"In some respects, it is the last vestige of a glass ceiling for women in the law," she says. "Ironically, I benefit from how few women there are in this area of practice because we are still a little bit of a novelty."

What separates Berk from the boys is simple—she knows she doesn't have to act like a man. Berk believes she can bring her own graciousness and charm to the table without forfeiting the position of her clients. At the end of the day, Berk says she wants her clients to feel they had the best advocacy possible and an advocate who protected them in every way possible.

A typical day begins with Berk spending the morning in hearings or court proceedings, then she meets with clients and conducts case meetings in the afternoon. At night, she returns home to her husband, Daniel Berk, and their 12-year-old daughter Blythe. There's no magic formula for balancing a high-power career and a family, Berk says. Both she and her husband knew they wanted to have a child and made that a priority, so they figure out how to make it work.

"She's the most fabulous kid on earth," Berk says of her daughter, the pride palpable in her voice. "I feel like I've had the great fortune of having a husband who is a true partner, and who has respected my professional aspiration as much as I have respected his."

If Blythe has an interest in the law, Berk says she will help foster it as her parents did. But right now, Blythe is thinking she will be an eye surgeon for half the year and for the other half of the year she will be a dog musher for a professional dog sledding team. Berk suspects that these career choices will change many times before her daughter finally finds her calling.

"One of the gifts my parents gave to me and my brother was encouraging us to find the things that excited us," Berk says. "My husband and I want the same for Blythe. There are no expectations."

Today, Berk's parents are enormously proud of their daughter's success—even if that means living a continent away from their beloved granddaughter. They understand their daughter's need to establish a professional identity and reputation apart from their own. But they might still bear a slight grudge that Berk didn't attend Chapel Hill for law school.

When asked what he is most proud of in reference to the daughter who followed closely in his footsteps, Mr. Bernholz says, "Her steadfast adherence to ethical standards and the rules of professional conduct, considering the demands from, and notoriety of, her extremely high profile clients."

As for Berk, she says she'll always miss her North Carolina home and visits as much as possible.

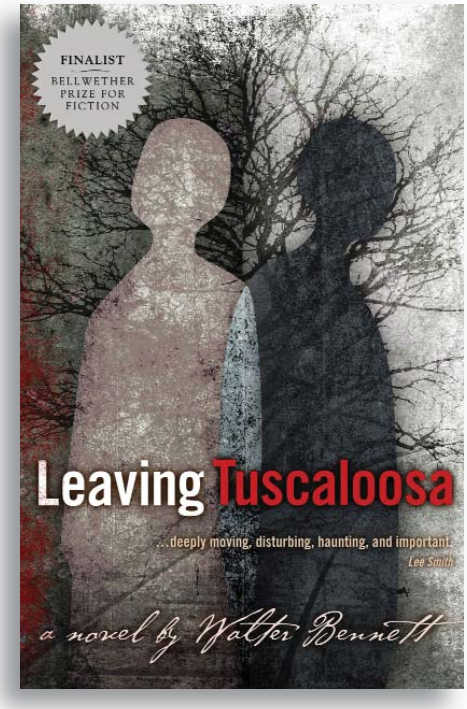
"I miss it keenly during UNC basketball games," she says. "I miss my family and everything from summer thunderstorms to summer tomatoes. My parents are terrific people and terrific lawyers and have really influenced what I do and how I do it." ■

Ms. London is a member of the faculty at Charlotte School of Law and a former professional journalist. She is a 2011 graduate of Charlotte School of Law and practiced with the federal judiciary in Washington, DC, Legal Aid of North Carolina, and established her own law firm before finding her passion in legal education.

An Interview with Author Walter Bennett

By John Gehring

When I first read John Grisham's book, *A Time to Kill*, I realized that I knew most of the characters portrayed therein, but knew them by other names. One benefit of being a country lawyer practicing in the Stokes County criminal court system is that you become a participant in the theater of the real. The courtroom is the stage; this is life in basic form. All this is fodder for the novelist, there for the taking by using his or her powers of observation.



The same feeling came to me when reading *Leaving Tuscaloosa*, a new novel by Walter Bennett. The actors and locations are similar. This book examines a period of America's civil rights history. Four black characters and four white characters face each other and themselves in a period of turmoil. Two brothers strive for equality using radically different methods. This book is about discrimination that occurred in the 1960s (and which continues today) between white and black, gentile and jew, southerner and yankee and the "haves" and "have nots," all based on ignorance and greed.

Again, I am getting ahead of myself in telling too much about this book when Walter Bennett is the person to describe his observations.

Thus this interview...

John Gehring: Your biography describes a life born in the South (in a formative era) and extending through a war; law school; the practice of law; and being an elected judge, law school professor, and author. Certainly these life experiences have played a role in the creation of your book. How so? How much of your book is based on personal observations.

Walter Bennett: It's all based on personal observation. I think that in some way, all fiction (and perhaps all writing) is based on personal observation. Growing up in the deep South in the '50s and '60s at the center of the civil rights movement made an indelible impression on me. The events of that era, the images, and the emotions became part of my conscious and unconscious education. In a way it was like the old English practice of "beating out the bounds," where the eldest son was shown the boundaries of the estate he would inherit and then made to run them while being beaten to ensure he committed them to memory. Times of tension and strife, acts of violence and courage, tend to stick in the mind and fuel the imagination. My experience in Vietnam had the same effect. In a different way, so did my life in the law, a line of work that was intellectually intense and required great focus of mind, but was also alive with drama—as you say, the "theater of the real." The people I knew as a lawyer and judge, the colleagues, the clients, the court personnel, were vibrant, often transfixing characters. The cases were stories, often hard, often moving, sometimes humorous—all part of a great, never-ending pageant. I loved being part of that without really appreciating the wonder of it at the time or what it was teaching me—particularly in regard to my capacity to see and understand people and feel the drama of life. Also, it helped me develop a still evolving ideal of justice, which I attempted to treat in the novel.

Gehring: Why did you write this book, especially since the race relations issues of the 1960s have mostly resolved themselves? Or have they?

Bennett: When I began this novel, I did

not see it as particularly current in terms of its racial theme. But as I worked on it, I began to realize that I was telling a moral tale about the coming-to-moral-consciousness of two young men. I think that coming-to-consciousness is a universal theme, and it is especially present in issues of race. I once took a writing workshop under Russell Banks, one of our best modern writers, and a man about my age. He said that race was the "defining issue" of our times. And I think he meant by that that race and one's moral struggle with the issues it raises are central to the development of one's character. Certainly for people who grew up when I did—especially in the South—that is true, regardless of one's racial category. And I think it is also true today, though it applies to numerous racial and ethnic groups, gender issues, and issues of one's sexual orientation, rather than just to whites and blacks. Perhaps more than any major country, we are a multi-racial, multi-ethnic society. The stresses and strains among groups are still there and, I believe, always will be. And where race is involved, the stresses seem to intensify. It's sad to say in a way, but I don't think one can write about race in America in any era and not be current. Perhaps someday that will change but not in my lifetime.

Gehring: Your characters, Acee Waites and Raiford Waites, are brothers who each have a different way of living their lives and addressing the issues of being black in a white southern world. Which of these brothers won their struggle, or did either?

Bennett: I see Acee, the artist, and his brother Raiford, the civil rights activist, as two phases of a single, finally realized life. For African Americans in that era in the South and elsewhere, there had to be Raifords, willing to take on the power structure and change it in order for the Acees to claim their lives and live out their dreams. Perhaps by being an activist and fighting for change, Raiford is living out his dream, too, or at least what he sees as his destiny. And we know that eventually his cause wins. So, I suppose in their own ways both brothers win their struggles, but without Raiford's struggle and sacrifice, Acee could not "win" his own.

Gehring: You describe at least three obvious discrimination issues in your book. There are the issues of race-based discrimination, of economic discrimination, and of religious/geographic discrimination. These issues of the 1960s have been partially resolved. Have these issues taken a back seat to the new hot button issues (or "isms") of gender discrimination, homophobic discrimination, and immigration discrimination? Are the new squeaky wheel issues getting the grease needed to finish (completely end) racism in America?

Bennett: My kids, now in their late 30s/early 40s, are amazed at the "discriminations" you mention, both past and present. They just can't understand where the feelings that feed those discriminations come from. That incomprehension is encouraging to me for future generations, but sometimes it seems a bit naïve. I think the demons lurking in all of those issues are basically the same: prejudice, hatred, fear, greed...the list could go on. And I think those demons are still with us. When today's "hot-button" issues are partially disarmed, there will be others, and some of those you mention will, for one reason or another, reassert themselves. The demons that infect them do not die. And on issues of race, the demons seem to have a vampire-like quality of eternal life.

Gehring: We don't live in a perfect world. Resources are limited, especially in the dire economic straits in which America finds herself, which means that some needs will not be fully addressed. Is there a priority in addressing these issues? Could the priorities be better understood by reading your book?

Bennett: I would like to think the book will encourage readers to reflect more deeply on the meaning of community—one's obligations to it and to one's fellow man. If we had more of that—what in the early days of the Republic was called "civic virtue," and what in the legal profession we sometimes refer to as the "ideal of service"—I think we would be better able to set national and local priorities in a more morally rational way. I see part of the theme of the novel—particularly in the character of the white kid, Richeboux—as a coming-to-consciousness about himself and his society, that it is a society fractured along the lines of race, and that the result of that is grave injustice to African Americans in the community, and in particular to his old friend Acee and Acee's brother Raiford. In other words, Richeboux breaks through his society's blindness and sees the big picture of the community as a whole, his place in it, and the moral obligations that entails. We hear a lot about how fractured our current society is and how that inhibits setting national priorities. There is a blindness to, sometimes even a rejection of, the idea that we are a national community with obligations to address the needs and welfare of other community members. This same attitude prevailed in the world I write about, except then it was based primarily on race. White society had to overcome its blindness toward others and see the greater interests of the community in order to move beyond what we would all now agree was an immoral system. We set a priority of "justice for all" and made great strides toward achieving it. It would be nice to think that we can have such an awakening again.

Gehring: I have enjoyed meeting you. Thank you for your time and for discussing your book.

Bennett: I have enjoyed meeting you. Thanks for the opportunity to talk about my book to members of the Great Profession. ■

Combating Domestic Violence with Legal Services

By Evelyn Pursley

What Is Domestic Violence?

Domestic violence occurs when one person in an intimate relationship uses a pattern of coercion and control against the other person during the relationship and/or after the relationship has terminated. It often includes physical, sexual, emotional, or economic abuse.

Domestic violence occurs in all kinds of families and relationships. Persons of any class, culture, religion, sexual orientation, marital status, age, and sex can be victims or perpetrators of domestic violence.

Why It Is Important to Combat Domestic Violence in North Carolina

• North Carolina ranks 4th in the nation in homicides committed by men against women. (The NC Department of Justice reports an average of more than 100 domestic violence-related homicides annually from 2008 to 2010.)

• One in four of our women will report violence at the hands of an intimate partner.

• It is estimated nationally that intimate partner violence costs employers over $5 billion annually.

• Approximately one-fifth of patients treated in hospital emergency rooms are treated for injuries inflicted by someone with whom they have an intimate relationship.

• One study found 54% of employees living with domestic violence missed at least three full days of work per month.

• Every nine seconds a woman is abused. Domestic violence is the #1 reason women and children become homeless in the US.

• Each year, intimate partner violence results in an estimated 1,200 deaths and two million injuries among women. About one-third of female victims of homicide were killed by their current or former husbands or boyfriends.

• A child's exposure to the father abusing the mother is the strongest risk factor for transmitting violent behavior from one generation to the next.

• More than 13% of high school students report experiencing physical violence by a boyfriend or girlfriend.

(Information from the North Carolina Council for Women, a women's advocacy agency within the North Carolina Department of Administration.)

NC Domestic Violence Victim Assistance Act

In 2004 the NC General Assembly passed comprehensive legislation designed to address the problem of domestic violence. Part of that multi-faceted program was to provide access to legal representation for domestic violence victims through established legal services programs under the Domestic Violence Victim Assistance Act.

A study by economists at Colgate and the University of Arkansas (Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 Contemp. Econ. Pol'y., 158, April 2003) has shown that the availability of legal services decreases the likelihood that women will be battered. The study notes that while shelters, hotlines, and counseling are vitally important crisis-intervention services, it is legal services that offer women certain important alternatives to the abusive relationships. The economists theorize that by helping domestic violence survivors obtain protective orders, custody of their children, child support, and sometimes public assistance, legal services programs help the women achieve physical safety and financial security and thus leave their abusers. Because legal services help women achieve self-sufficiency, they are a good place to spend public money.

Funding through this NC statute is used (1) to provide legal assistance to domestic

violence victims; (2) to provide education to domestic violence victims regarding their rights and duties under the law, and (3) to involve the private bar in the representation of domestic violence victims through cases that address actions for protective orders, child custody and visitation issues, and legal services that ensure the safety of the client and the client's children.

The state funds are provided from court filing fees ($.95 on each) sent to the State Bar for distribution to Pisgah Legal Services in Asheville (serving Buncombe, Henderson, Madison, Polk, Rutherford, and Transylvania counties) and Legal Aid of NC (serving the other counties statewide). Allocations to the two programs are based on: 20% divided equally among all NC counties and 80% allocated according to the numbers of 50b protective orders filed in their program areas during the previous state fiscal year as established by AOC statistics. In the 2011-12 state funding year, $1,205,404 was distributed specifically for these purposes.

Pisgah Legal Services' Mountain Violence Prevention Project

The Mountain Violence Prevention Project (MVPP) is a collaborative effort of Pisgah Legal Services (PLS) and domestic violence prevention agencies in six western North Carolina counties. By integrating legal and other supportive services, the MVPP provides a continuum of care for low-income victims of domestic violence in that region.

The Mountain Violence Prevention Project helps victims of domestic violence take legal action to escape abuse and rebuild their lives. Through MVPP, Pisgah Legal Services helps victims secure court protective orders to improve their safety. PLS also helps victims address a range of other issues to live apart from their abusers, including child custody and child support, divorce, division of marital property, housing, and consumer issues.

Funding for this program comes from the state of North Carolina; a Violence Against Women Act grant from the US Department of Justice; NC DSS Family Violence Prevention; the Governor's Crime Commission; and three local United Way programs. Support also comes from the Mountain Area Volunteer Attorney Project, a *pro bono* referral program made up of more than 325 active private attorneys who volunteer their services to help meet the need for civil law representation of low-income residents of Buncombe, Henderson, Madison, Polk, Rutherford, and Transylvania Counties. Formed in 1983, the program is lead by an advisory board consisting of private attorneys.

Unfortunately, PLS lost $350,000 of its $600,000 in annual funding for MVPP this year when three federal grants were cut. The NC Governor's Crime Commission did not renew a $211,000 grant of federal funds passed through to the state. The US Department of Justice reduced the amount that could be sought per year from $230,000 to $100,000. A third grant was lost when the US Department of Housing and Urban Development eliminated funding for supportive services in transitional housing for victims of domestic violence. PLS is attempting to replace that $350,000 in order to serve more women and children victims of domestic violence.

Legal Aid of North Carolina Violence Prevention Initiative

The Domestic Violence Prevention Initiative (DVPI) is a specialized, statewide project of Legal Aid of North Carolina (LANC) that provides legal assistance to victims of domestic violence. It is comprised of attorneys/advocates based in LANC field offices (geographically located across the North Carolina) and a project director located in Raleigh. These DVPI attorneys/advocates are trained in the laws available to help increase the safety and self-sufficiency of victims, as well as the dynamics of domestic violence and safety planning.

Legal Aid of North Carolina's DVPI works closely with community-based programs, agencies, and task forces serving victims of domestic violence. The DVPI has existing formal collaborative agreements and referral protocols with more than 60 domestic violence victim services organizations throughout the state, and informal working relationships with at least 20 others. The DVPI also partners with the University of North Carolina School of Law, at which a DVPI attorney trains and supervises law students in the domestic violence clinic to represent victims of domestic violence.

The types of services that are provided vary between office areas as a result of funding resources and restrictions. LANC supports domestic violence work with funding from the state of North Carolina. LANC also receives funding for domestic violence work from a Victims of Crime Act (VOCA) grant to provide emergency-only services, such as obtaining and enforcing protection orders.

Why This Work is So Important—One Woman's Story

"Elizabeth's" alcoholic husband held her captive and tortured her for three terrifying days. During the attack, their two-year-old clung to her mother, crying. When her husband finally passed out, Elizabeth escaped to the hospital—having been almost beaten to death. A legal aid attorney helped her secure a court protective order, divorce, and custody of her daughter. Legal aid allowed Elizabeth to escape abuse and rebuild her life. She now works as a school principal and is married to a kind man. Her daughter is thriving in kindergarten. They are just two of the many who need assistance each year to rebuild safe and productive lives. ■

Evelyn Pursley has been the executive director of NC IOLTA since July 1997.

This article was written using material from the NC State Bar Report to the General Assembly regarding the Domestic Violence Victim Assistance Act.

State Bar Outlook (cont.)

reproach. I think it can be improved without being diminished. Perhaps all that is necessary is a debate infused with commonsense, decency, and credibility. Fortunately, my dad is available to facilitate a solution of that sort. And the great thing is that he doesn't want—and won't accept—any credit. ■

Lowell Thomas Lunsford II is the executive director of the North Carolina State Bar.

Endnotes

1. Where they still talk about his essential goodness.
2. NC Gen. Stat. Chapter 132
3. NC Gen. Stat. §132--1
4. NC Gen. Stat. §132-9(d)
5. *News and Observer v. Poole*, 330 NC 465, 412 S.E. 2d 7 (1992).
6. It is noted that the custodian of material prepared in anticipation of trial in a pending legal proceeding that is subject to the discovery rules may be required to produce that material only upon motion to the court in which the matter is pending. *See* NC Gen. Stat. 132-1.9(d) 1.
7. NC Gen. Stat. §132-9 (a).

Meet the Federal Judges—Judge Martin Reidinger

By Michelle Rippon

Here is a judge who is intelligent, disciplined, focused, and not given to trivial pursuits. He reads only non fiction, mostly history. Even his travels, which he thoroughly enjoys, are serious: Nepal, Tibet, and most recently Machu Picchu.

None of this is surprising given the environment in which he was raised. His father, a first generation immigrant from Austria, was an international expert in polymer chemistry—one of two United States delegates to the prestigious International Union of Pure and Applied Chemistry. IUPAC is the recognized world authority in developing standards for naming chemical elements and compounds as well in other fields of science; for example, standardizing nucleotide base sequence code names. While IUPAC's headquarters are located in Zurich, Switzerland, the administrative office is located in the Research Triangle Park. Reidinger describes his father as "quiet and reserved. You never knew what he was thinking—only that he was thinking."

Martin Reidinger was born in 1958 at Yale Hospital in New Haven, Connecticut. Four years later, the family moved to Brevard, North Carolina, when his father was transferred to the Olin Mathieson Chemical Company in Pisgah Forest. His father began as the director of the testing labs in the cellophane plant and was eventually named the director of research for the plant. Reidinger attended public schools in Brevard and graduated from Brevard High School where he played basketball, participated on the math team, and was active in the drama club. In fact, he began undergraduate school majoring in radio, television, and motion picture communications. His professor in his broadcast law and management course was both his advisor and a great teacher, and Reidinger began to take an interest in communications law as a career. He graduated from the University of North Carolina in Chapel Hill in 1981, majoring in communications although, as it turned out, he had enough hours to graduate with a history major. As an undergraduate he worked in the Wilson Library on campus.

Reidinger returned to UNC-Chapel Hill and graduated with his law degree in 1984. He found law school thoroughly enjoyable, at least after the first year. He served on law review, and during the summers he clerked with two small, general practice firms in Brevard. He worked on everything—both criminal and civil cases, drafting pleadings including motions and briefs, as well as preparing and responding to discovery requests. He even drafted multiple briefs to the North Carolina Court of Appeals.

Immediately after law school, Reidinger joined the Asheville firm of Adams, Hendon, Carson and Crow (currently Adams, Hendon, Carson, Crow and Saenger). He began as a civil litigator, representing both plaintiffs and defendants, later concentrating on business and construction litigation as well as municipal law and land use including annexation and zoning. For the most part his practice was limited to the small towns and rural areas from Shelby to Morganton, Bakersville to Robbinsville, Murphy to Franklin and Hendersonville, each with its own unique issues and interests.

In September 2006, on the recommendation of United States Senators Richard Burr and Elizabeth Dole, President George W. Bush nominated Reidinger to the federal bench to replace Graham Mullen, who had assumed senior status. He was confirmed by the United States Senate on September 10, 2007, and received his commission two days later on September 12.

Judge Reidinger is one hard-working judge, frequently working 12-hour days as well as Saturdays. Even when on vacation he keeps track of his office by email. He admits to being a perfectionist, determined to "get it 100% right 100% of the time even though I realize that is not a realistic goal." His office might be described as orderly chaos, with files and papers covering virtually every available surface, and, he confesses, often spilling over into his conference room. Nevertheless, he can put his hand on any file he's looking for or working on.

Here are some facts to know about how Judge Reidinger views litigation issues in his court. First, have a good reason for seeking extensions—deadlines are essentially "carved in stone." He tries to set up a reasonable schedule for a case at the very beginning in the Case Management Order. He expects

attorneys to abide by those deadlines as they provide predictability and reliability for both attorneys and litigants. If an extension of time is necessary, it should be made early unless in an extreme emergency, in which case the reasons must be clearly articulated.

Second, the Judge is not a proponent of dispositive motions. He begins with the assumption that the motion should likely be denied. Indeed, if a summary judgment is granted in a case, it often indicates that the lawyer opposing the motion "learned a lot about his case during discovery that he wished he had learned before he filed his complaint." He carefully reviews the entire record even if it is voluminous. He is likely to rule from the bench if the motion is denied in order to give attorneys the maximum amount of time to prepare for trial. And, one valuable bit of advice in this time of technology: "Leave your power point presentations at home." Reidinger hears about half of the summary judgment motions that are filed in his court. The ones that are scheduled for argument are those about which he has questions. He wants attorneys to be prepared to respond to his questions rather than reiterating what was already stated in the brief. Very occasionally a discovery dispute will reach his chambers. His advice comes from retired Superior Court Judge Douglas Albright: "Remember that someone is paying the other guy's attorney fees." Finally, he sees as part of his role the opportunity to assist young inexperienced attorneys who may need a little help in learning how to try cases. He understands the challenge of trying a case well.

Reidinger's many years of experience as a practicing attorney have resulted in an appreciation for Alternative Dispute Resolution, especially mediation. He considers ADR an "invaluable aspect of the court system." He believes that in the vast majority of civil cases filed, plaintiffs are simply looking for an objective third party to listen to their stories. "This is often more important to them than actual vindication." Mediation may also give the litigants an opportunity to learn what problems there are with their cases. He observes that if a case does not settle at mediation, one or both attorneys have often failed to carefully evaluate the case.

Despite the fact that he sees mediation as the preferable way to resolve a case, he thoroughly enjoys trying cases. Unlike the practice of law where the attorney is limited to just one side of a case, he finds it intriguing to watch "the pieces fit together as the story unfolds." The frustration for him is to watch attorneys attempt to make their points without adhering to the rules of evidence. He advises attorneys to articulate for themselves how they can prove each point and then "put together the building blocks of evidence." Unlike the hearings on summary judgment motions, Judge Reidinger appreciates the use of technology during trial when it is done well. However, he believes that many attorneys need to work on using technology more effectively. Attorneys who appear before Judge Reidinger describe him as a considerate and thoughtful jurist who is not afraid to make a tough decision. In the courtroom he keeps both sides on their toes.

Pro se civil cases and criminal sentencing hearings consume a significant amount of Reidinger's time and represent the most challenging and time-consuming aspect of his work. Many of the records in the *pro se* civil cases are voluminous and he reviews every document in order to assure that all relevant

CONTINUED ON PAGE 39

Becoming Jackie

By Heather Bell Adams

The last time I ever had lunch with Alexis was right after Christmas. It was also the first time in a long time that I lied to my mother, but it was something I had to do. I didn't really have a choice.

The day started out with Mother sitting at the table in her yellow robe and asking what Father had cooked for Christmas dinner. My sister, Suzanne, who was 15 and a year older than me, was sitting beside Mother eating a piece of toast. She didn't answer Mother's question. After I rinsed my plate off in the sink, I turned around and told her that we'd eaten chicken with red sauce and pizza cheese on top of it, green beans, and rolls shaped like knots. Mother said it was a shame that he'd gotten the first Christmas because it left her with nothing to do. I wondered why she didn't stay home and watch TV, but then I remembered that we'd cancelled the cable because it was too expensive and she wouldn't even get to see the parades.

She had ended up going to Atlanta to visit Grandmother Sarah, who was forever telling Mother about all the things she'd done wrong. Everything started going downhill fast when she went to state school instead of Bible college in Mount Vernon. She never should've attached herself to a man from Macon. She should've known that she'd get herself pregnant and have to drop out without her degree. That they would have to rent a house on the wrong side of town, a place with stains on the carpet and rust on the refrigerator door. That they would fight all the time about money and he would end up moving out.

"Get all those tangles out of your hair before you leave for school," Mother said. She was still sitting at the table.

"Yes, ma'am," I said as I left the kitchen. We're supposed to call our parents "Mother" and "Father," and say "ma'am" and "sir." That's one thing Grandmother Sarah approves of. One time I heard her telling Grandfather Holden, "Even though those girls don't have much, at least they have their manners."

Suzanne was in the bathroom with the door locked. I could picture her stepping back from the mirror and tilting her head to see if her high, bouncy ponytail was in the right place. Her hair was a little darker than mine, but still blonde. The main difference was that hers was straight as a ruler and didn't stick out all over the place like mine did. Her cheeks didn't get red when she was hot. Even her eyebrows behaved. One day I watched her get ready to see how she made them curve into arches. She didn't do anything except wet her finger and wipe over them on her way out, like it was nothing.

When she finally came out of the bathroom, she looked me up and down.

"Really, Judith, another sweatshirt? I swear, there's book smart and then there's, well, I don't know." She shook her head and her ponytail swung back and forth. All of Suzanne was small and put together like a doll. I was small all over too, except that I had these big, awful, mushy breasts, even though I was only 14. Most of the time I wore a too-tight bra to mash them down and a big sweatshirt, and I would stuff my hands in the front pocket of the sweatshirt trying to make people look there instead.

Once we got to school, there was homeroom, Spanish, and social studies. Right before lunch, we had 20 minutes in the media center. That was my favorite time of the day. The teacher didn't care what we did on the computers. She said we knew what was appropriate and what wasn't. I loved looking things up. Of course you couldn't believe everything you read online, but you could learn a lot. Most of what I knew about Jackie Kennedy I found in a big, hardcover book that my father gave me for my birthday or on the Internet. There were lots of pictures of her back when she was First Lady and right after. Smiling, touching her pearl necklace, wearing big sunglasses. She was always, and I mean always, perfect. Her little hats and her leather shoes. Her pink lips. Her dark hair, as smooth and thick as fur. And the other thing about Jackie was that she was not fazed by whatever was going on around her. No matter what. Not even on that terrible day when her husband was shot and killed. There she was, standing up straight and holding out her hand to somebody, looking like a sad, elegant saint.

Sometimes Suzanne would tell me, "You'll never look the least bit like Jackie." When she said it, she would stare at my chest, which made me want to smack her. Maybe I wasn't supposed to look at Jackie Kennedy's chest, since she was a First Lady, but I couldn't help it. Mine was nothing like hers. Nothing.

Suzanne and Mother got tired of me talking about Jackie so much.

"You have to live in the present, Judith," my mother said one time, right after Father left. "It's 2010 and we're in Macon, Georgia. And it's coming up on the middle of winter and some people are losing sleep worrying about how much the heating bill's

The Results Are In!

This year the Publications Committee of the State Bar sponsored its Tenth Annual Fiction Writing Competition. Eleven submissions were received and judged by the committee members. The submission that earned second prize is published in this edition of the *Journal*.

going to be—something the Kennedys never did." She jabbed her finger at the table as she talked.

I knew not to mention anything about the Kennedys being Catholic, especially not to Grandmother Sarah. She thought there was something suspicious about the candles. All of those tiny flames, and each one somebody's prayer. I thought that was a beautiful thing. I guessed the music in a Catholic church was beautiful too. Mysterious. Maybe you couldn't understand all the words, but you knew they were saying something nice. In the pictures that I found, Catholic churches looked pretty dark inside, but I didn't think that would bother me. You could sort of hide if you didn't want everybody looking at you, and the candles would be nice and bright.

That day at school I was wondering if Grandmother Sarah was right when she said that Mother had taken a wrong turn going to state school instead of the Bible college in Mount Vernon. I looked up the Bible college website. There were all these nice-looking kids sitting on the greenest grass you've ever seen, laughing at the books they were holding on their laps. Grandmother Sarah went to the Bible college and got her education degree. She was teaching third grade when she met Grandfather Holden. He came through the school with a big crowd from the superintendent's office. He stayed behind in her classroom while the rest of the group set off to tour the gym, watching as she wrote on the chalkboard and checking to see if she wore a wedding ring. Grandmother Sarah loved that story. The story she cannot stand is how our parents met in a parking lot before a football game.

"It's called tailgating," our mother would tell her.

"Well, it's no way to start anything. Standing around with music blaring," Grandmother Sarah would say. "It's not done in Mount Vernon."

We still had time before the lunch bell rang so I looked up a map of Georgia. There was Mount Vernon southeast of Macon, on the way to Savannah. In October the sophomore honors history class had gone to Savannah. Alexis had lunch with me when they were gone. She'd heard they got to take the air-conditioned buses and stay overnight in a motel. I wanted to be in honors history the next year so that I could go, but Alexis said she didn't care. She'd been to Savannah lots of times and it was smelly because of the paper plant by the river. When I looked it up, I saw big old oak trees in the bright sun, with the Spanish moss in them like tangled hair.

After the bell rang for lunch, I logged off the computer and went to my locker. Since we were finally in high school, we could eat lunch anywhere on the school grounds, wherever we wanted except in the library. Most days I ate by myself. My favorite spot was by the band building. It was quiet at that time of day, but I sometimes imagined music being played inside. The high, chirping notes of a piccolo, the silly sounds of a bassoon, like a frog, and a sharp trumpet interrupting, like what it had to say was most important.

I never knew when Alexis would want to have lunch with me, but when she did, she wouldn't go over by the band building. She said it was lame. She wouldn't be caught dead where the band geeks hung out. That day when I got to my locker, she was there waiting for me. We walked over to the hallway where the seniors' lockers were and sat down on the carpet with our backpacks. The seniors had lunch later than we did and they were supposed to be in class, but we could hear people slamming their locker doors. If she saw one of the popular boys, Alexis sat up straight and twisted her hair around her finger.

I started telling her about how Suzanne had taken so long getting ready that morning, but Alexis interrupted me.

"I know who the popular sophomore girls are, and Suzanne isn't one of them," she said, taking her sandwich apart. It made the air smell like peanut butter. She put the top slice of bread back in the bag and took apple slices from another bag and started pushing them through the peanut butter.

"She's pretty at least."

"Whatever." Alexis shrugged. "Did you hear about that party some of the juniors are having this weekend? Mostly the football guys. Supposed to be awesome."

"You think Evan will be there?"

"I bet he will be." She nodded. "I'd do pretty much anything to get invited."

Alexis had liked Evan ever since school started. She always talked about him. When she ate lunch with the girls from her neighborhood, which was most of the time, they sat on the steps near the bleachers where the sophomore and junior boys hung out. After they ate, they went out on the field and practiced for cheerleader tryouts. From the band building, I could hear them yelling to each other about jumps. None of them had made the team at the start of the year, but Alexis said freshmen almost never made it that early. She was positive they would have a better shot in the spring.

"Once it gets to be the week of tryouts, it's crunch time. We're going to have to step it up. Maybe work out in the gym at night, something like that," she said.

"Come back to school, you mean? Won't it be locked?"

"No," she laughed. "At the family center, the one in our neighborhood."

I'd heard about her neighborhood before. Alexis said the best part was the pool. Anybody who lived in the neighborhood could use it. She said maybe I could go with her in the summer, but if there was one thing I didn't want, it was to be seen in a bathing suit.

As soon as we finished eating, Alexis would always ask if I could help with her homework. It was usually geometry. She would slide the paper over to me and I would dig around in my backpack to find a pencil. While I did her homework, she usually pulled out her phone and start texting, laughing every now and then. That day she only had one sheet of problems and it didn't take me long to finish. You could tell she was surprised when I handed it to her.

"Finished already?" She gave me a high-five. "Score! Thanks, Jude."

I sighed. Jude was not a ladylike name, not like Judith, a name that even Jackie might have liked. I waited to see if Alexis would keep talking to me until the bell rang. There were at least ten minutes left, and I guessed she would have something else to do. She packed up her backpack, zipped it closed, and pushed herself up off the floor. She still had her phone out, and she was laughing and shaking her head as she read a message.

"People are crazy. Totally crazy, you know? What's the big deal about touching them?" She shook her head. "Come here for a second. Let's go over to the bleachers."

I was so surprised that she wanted to go somewhere with me that I didn't ask her what was going on. I let her lead me around to the back of the school, where there were metal bleachers and under them, a dark place where there wasn't any grass, only dirt. There was trash everywhere, wrappers from bags of chips and soda cans, some of them bent

almost in half.

Banks Murphy walked over to where we were standing. He was wearing dark jeans and a brown sweater with a blue t-shirt poking through at the neck.

"You came. Alright," he said, taking his phone out of his pocket and typing a text.

"Yeah, so about Saturday – Evan's coming too, right?" Alexis asked.

"Um, yeah, I think so. Probably."

Alexis turned around to leave and I started to follow her. Banks stepped forward like he was going to stop me. Alexis looked at him and he made a sort of squeezing motion with his hand.

"No big deal, Alexis. Seriously," he said. "Just be cool."

I wished we were still sitting in the hallway and I was doing Alexis' homework, something I understood. Alexis and Banks stared at each other. She flipped her hair back and nodded at Banks, and that was when I should've started to run, but I didn't. I stood there and watched her leave.

All of a sudden, I was surrounded by boys. Banks and Ryder and Jordan. They were tall, way taller and bigger and stronger than me, and they were coming toward me. I didn't understand what was happening until one of them started pointing at my chest and saying something about a nice handful, and they were all laughing and coming closer. I turned to run, but they were too close and one of them reached out and stopped me. He grabbed my arm hard and asked where I was going.

"To class," I said. "I think I heard the bell." He laughed. "Please," I said and I started backing up, shaking my head. I backed into a metal post and somehow they were all around me. I couldn't keep their hands off me. They were pulling and reaching and grabbing and it was so dark under there, it was like a cave and I wanted there to be pretty little candles. There should have been prayers all over the place, but there weren't. And when the bell finally rang, there was noise everywhere and it was so loud that nobody could hear me screaming.

On the way home from school, I lied to my mother. I told her that I needed to go to the store.

"It's an emergency," I said, and that part was not a lie.

"What kind of emergency, sweetie?" Even though she said sweetie, she said it in that tired voice, the "what now" voice. I had to come up with something believable.

"We have this project in art. Renaissance and all that." She didn't say anything, just kept looking at the road. What would I do if she said no? What if she said we don't have time, or not today, maybe tomorrow?

"I have to get paper, the thick kind like artists would use. It'll just take a minute. Look, it's extra credit if I can turn it in tomorrow." Suzanne rolled her eyes.

"How much does it cost?"

"I don't know, but I'll pay for it myself." She didn't ask how I got the money, and I didn't tell her about how Ryder's wallet fell out of his pocket. After they left, I felt like I was going to throw up and I sat down, right on the dirt and I kept sitting there, even though I knew I'd get a tardy slip. When I finally got up, I reached for the wallet and I took all the money out and put it in my pocket. Two twenties and a ten. And I threw the wallet down and kicked it way under the bleachers where nobody could find it.

"Alright, but be quick about it." Mother finally said and she turned into the store parking lot and parked the car. "I have to get dinner going, and then I'm going down to Lynn's tonight. She's paying me ten dollars an hour to watch the baby."

"Yes, ma'am." I closed the car door and walked quickly into the store. I didn't have much time. I had to hurry or Mother would be in there after me. I picked up box after box, but none of them looked right and I was about to give up when I finally saw one that seemed pretty good. I snatched it up to look closer. I thought it would probably work. It had to. On my way to the cash register, I got art paper too, in case Mother remembered the lie.

That night after Mother left to watch the neighbor's baby and Suzanne went to bed, I got to work. I took the sharp scissors from the kitchen, and I stood in front of the bathroom mirror and started cutting my hair. When I was finished, it wasn't quite straight along the bottom, but it was close.

I got the bag from the store and pulled out the instructions for the hair dye. I didn't want to stain anything so I stood there without any clothes on, watching the minutes on the clock until it was time to rinse it out. There were bruises on my waist and a scratch on my neck, but otherwise I looked normal. I looked mostly the same as I had that morning before school.

When the time was up, I took a long shower, watching the dark dye drain off me like old blood. I put on Mother's yellow robe and started drying my hair with the hair dryer. While it was still a little wet, I turned off the hair dryer to check on the color. From what I could tell, it looked close, but it was hard to say for sure. After I got it completely dry, I held my breath and took a really good look in the mirror. I checked the front, the sides, and the back, and then I let all that breath out. It was definitely how I wanted it to be. It was absolutely perfect.

The old blonde hair was all over the bathroom floor. There was so much of it. I got the broom from beside the back door and swept it up. At first, I was planning to throw it away, but then I thought of those places that made wigs for people. I decided to find one later on the computer. I ended up stuffing all that hair in the plastic bag from the store, and I tied the handles in a knot so it wouldn't fall out.

I went back to the bathroom and looked in Mother's makeup drawer until I found the right lipstick. I leaned up close to the mirror like I was about to kiss it and I put on the lipstick, being very careful not to smear it around the edges. It looked very ladylike. I looked like I had recently eaten a strawberry cupcake. By then it was late and I was too tired to do anything else. I didn't want to think about anything.

I fell asleep still wearing Mother's robe. I dreamed that I was at a band concert where the instruments came to life. The clarinets grew and grew until they became gorillas, beating their chests. The flutes turned into birds and flew away. The drums were the only instruments that didn't come to life. They turned into big, gray rocks. But I could still hear the cymbals crashing like someone screaming.

And then there really was someone screaming and it was Mother. She was pulling me out of bed, asking what in the hell I had done to my hair, my beautiful, long, blonde hair that was her favorite part about me. And I didn't know what she was talking about because she had never told me that. Never.

She pulled me along the hallway to her room, past her dresser and the big, framed mirror on the wall, and over to Father's old closet. She opened the door and I saw some flannel shirts and a pair of running shoes.

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An Interview with New President Ronald G. Baker Sr.

Q: What can you tell us about your roots?

I grew up in the small town of Ahoskie. Both sets of my grandparents were farmers and I spent a lot of time on their farms as I was growing up. My father had six brothers and sisters and my mother did as well. As a result I had lots of aunts and uncles and cousins. We had lots of family get-togethers including almost every Sunday at one grandparent or the other's house for lunch. There would be so many folks there that the adults would eat first and then the cousins would eat afterwards.

Q: When and how did you decide to become a lawyer?

I worked at a drug store on Saturdays and during the summer when I was in high school. Pharmacy seemed to me to be pretty light duty so I decided to be a pharmacist. I was nominated for a Morehead Scholarship from my school and had to fill out an application that included an essay concerning what I wanted to do in Chapel Hill. Of course I wrote about my great desire to become a pharmacist. A few weeks before the final interviews I got a call from the Morehead Foundation advising that the scholarship required that a recipient be in a four year program. At that time pharmacy was a four and one-half year program. I was told to write a new essay with a different plan. Frankly, I didn't have another plan. In considering what I might do, I recalled that one of my grandfathers told me repeatedly that I talked more than a Philadelphia lawyer. In reflecting on it, I decided law might not be such a bad career. I wrote a new essay setting out my great desire to get a business degree and then go to law school. I won a scholarship and then actually followed through on the plan.

Q: What's your practice like now, and how did it evolve?

I started work out of law school with Henson, Donahue and Elrod in Greensboro. That firm did insurance defense work and that is what I started doing. After a few years, my wife and I decided we liked small town living and moved back to Ahoskie. There, some of the insurance companies I had worked for in Greensboro began sending cases to me and that practice grew. I now still do some insurance defense work, but also do legal malpractice defense, commercial litigation, and plaintiffs personal injury work. I do limit my practice to civil trial work.

With his wife Clara Ann looking on, Ronald Baker is sworn in as president of the State Bar by Chief Justice Sarah Parker

Q: How and why did you become involved in State Bar work?

My former partner W. Hugh (Buddy) Jones was the counselor for our district for ten years. He really enjoyed being a counselor and encouraged me to seek the position when he was no longer eligible. I did so and was successful.

Q: What has your experience on the Bar Council been like and how has it differed from what you anticipated?

I have greatly enjoyed serving on the council. In fact, it has been the most rewarding service I have engaged in during my professional career. I have been most impressed with the seriousness of purpose with which the councilors approach the council's work.

Q: Can you tell us about the most difficult issue you've faced as a member of the Bar Council?

Several come to mind. There was the Alan Gell matter involving allegations of prosecutorial misconduct. The same thing happened again with the Mike Nifong situation. The most difficult matters, however, have involved petitions for reinstatement by disbarred lawyers. It is very difficult to sit in judgment on whether a person's livelihood will be restored.

Q: What do you think are the biggest issues currently facing the council?

We seem to have many issues involving the unauthorized practice of law and much litigation in that area. We also have the possible impact of the *FTC v. Dental Board* case to deal with if we are unsuccessful in getting it over-

turned. In addition, we have continued problems with the glut of lawyers entering the market with large debt loads and few job prospects coupled with end-of-career issues with aging baby boom lawyers who are starting to reach retirement age. Finally, there is the steadily increasing burden on the State Bar's resources in dealing with public records requests.

Q: Speaking of litigation, there's been a lot of publicity concerning the LegalZoom case. Can you remind our readers what's at issue in that matter and bring us up to date concerning its status?

A few years back the Authorized Practice Committee determined that there was cause to believe that LegalZoom's activities in North Carolina constituted the unauthorized practice of law. A "cease and desist" letter was sent to the company, but no enforcement action was filed. A year or so ago, LegalZoom sued the State Bar in a case moved to the business court alleging that the State Bar's activities involving it violate the anti-monopoly clause of the North Carolina Constitution. That case is now before the court on cross-motions for judgment on the pleadings.

Q: In your view, what is the significance of that litigation?

It seems to me that the real impact of the case will be its effect on what constitutes the practice of law. If the statutory definition of what constitutes the practice of law is not enforceable by the State Bar, the scope of the profession may change dramatically in ways we haven't even thought of yet. I could foresee real problems in the real estate area resulting. I also see great potential for public harm resulting from use of prepared forms that are not really suited for their situation and that forfeit or impair important legal rights.

Q: The State Bar, though not a party, has taken an active role in the litigation involving the Dental Board and the Federal Trade Commission. What's going on in that case and why should lawyers be concerned?

The Dental Board case seems to hold that when the regulators of a profession are members of the profession and are elected by their peers, they are private, rather than state actors, and as such are not entitled to state action immunity from claims under the Sherman Act. If that ruling stands it could profoundly affect our ability to get qualified folks to agree to serve as councilors. It could also force a layer of supervision over the State Bar by other State agencies that may or may not have the expertise to properly regulate the practice of law. Following the Fourth Circuit decision, a petition to rehear or rehear *en banc* was filed by the Dental Board. The State Bar filed an amicus brief in support of the petition. When it was denied, the Dental Board filed a petition for a writ of certiorari with the United States Supreme Court. The State Bar intends to file an amicus brief in support of that petition as well. We have called this decision to the attention of the governing boards of the legal profession in the other states and solicited them to join our efforts. Many have declined, but several have agreed to join in our brief. In addition, we are soliciting the help of other North Carolina boards that may be affected.

Q: Do you anticipate that the State Bar will have to change any of its procedures, policies, or programs to accommodate the Dental Board decision?

That is certainly a possibility, especially in the authorized practice area. A committee has already been formed and has begun work reviewing our rules to see what changes, if any, might be necessary.

Q: The State Bar's recent Annual Meeting was held in the new building. How did that go? Is our new headquarters everything you had expected it to be?

In truth the new building is more than I ever expected it to be. The members of the profession in this state can be proud of the structure that has been erected by the State Bar. I believe it is as fine as any in the country. It fits perfectly in the state government complex. When my son and I were walking out of the building after our council meeting, he asked what had the building been before we took it over. That is a testament to how well it fits into the area. It is a great benefit to our staff, for our meetings are now in the same building as their offices. It allows them to work between meetings, and that greatly improves productivity during weeks when the council is meeting.

Q: Are there any remaining issues concerning the construction of or payment for the new building?

The building is complete other than a few very minor punch list items. The issues remaining are financial and deal with the responsibility for the delay in completion and occupancy of the building resulting from problems with the very top of the building's façade. A "closeout" committee of councilors is dealing with those matters and we are hopeful everything will be resolved by the April council meeting.

Q: The North Carolina State Bar Foundation, which is independent of the Bar Council, has run what appears to have been a very successful fund-raising campaign in support of the new building. What does that say about the profession in our state?

The North Carolina State Bar Foundation raised just over $3 million from the lawyers of North Carolina for use in the new building. Those funds are used for enhancements to the building rather than for the basic building itself. The generosity of our lawyers exceeded all of our expectations. It is a testament to the pride that the lawyers of this state take in their profession.

Q: Are we going to need a dues increase anytime soon?

Even if we wanted to increase dues we could not do so at this time because we are at the statutorily allowed maximum. However, in planning for the building, its cost was taken into account in forecasting dues needs for the next decade. Absent some unforeseen circumstances, no increase should be necessary in the next few years.

Q: At your installation as president, you mentioned your intention to make sure the State Bar is more inclusive and diverse in its regulatory activities and its governance. What are your plans in that regard?

As I said in my talk, we cannot elect councilors. Only the district bars can do that. However, the practitioners in this state are much more diverse than the council itself. The president appoints over 30 advisory members to the various State Bar committees. It is my intention that more than half of my appointments be ethnic minorities or women or both. Hopefully these folks will see what a rewarding experience working with the State Bar is and seek councilor positions in their districts when they become available.

Q: The State Bar has a special committee that is considering revisions to the Rules of Professional Conduct that are being proposed by the American Bar Association's Ethics 20/20 Commission. Why do we need more changes to our ethics code?

Changes in society in general, and in technology in particular, demand changes in the way we practice law. The ABA revisions deal with those changes. Some of the changes reflect current practice and some are aspirational. Our committee is going through the proposed changes and our rules to see where they need to be changed to more accurately reflect the practice here and give better guid-

ance to our practitioners. We hope to finish this process in 2014.

Q: You've been an officer during the past two years, first as vice-president and then as president-elect. What has that been like? Does the president generally call the shots unilaterally or does he seek consensus among all the officers before taking action?

While serving as an officer I have learned that the president rarely makes decisions alone. Instead, the four officers act as a subcommittee of the executive committee. Matters of substance are discussed in officer meetings or conference calls, and decisions are made collaboratively, usually by majority vote.

Q: In your opinion, does it make sense for lawyers to be regulating themselves? Is it good public policy? Do we deserve the public's trust?

It is difficult for me to see how a group of people not trained in the law could possibly regulate in the public interest. The knowledge of how lawyers work would simply not be there. Further, I think it is important that the "regulators" be elected by the members of the profession rather than appointed by the executive or judicial branches, as it keeps politics and favoritism out of the equation. My experience with the council over the past 11 years has shown me that the councilors really do try very hard to act in the public interest rather than acting as a protectionist trade group.

Q: You were on the State Bar's Grievance Committee for many years and then served as its chair. What was that like?

Two things particularly stand out. First, lawyers get in trouble most often for failing to communicate with their clients than for anything else. Second, certain lawyers seem to get into trouble over and over. It's rather like going to criminal district court. One sees the same faces over and over.

Q: Is there anything that you think we ought to be doing differently or better in regard to the investigation or prosecution of disciplinary cases?

I think our staff does a very good job in investigating and prosecuting cases. The only thing I want is cases to be handled as expeditiously as possible, consistent with giving both the complainant and the accused lawyer the thorough job they deserve.

Q: In your opinion, are there too many lawyers? Is this something that ought to be of concern to the State Bar?

There are certainly a lot of lawyers and there are a large number of new lawyers every year. However, I do not think that whether there are too many or just enough is a matter of concern for the State Bar. That is a matter to be dealt with either by market forces or the legislature. Our job is to regulate those who the Board of Law Examiners licenses.

Q: Tell us a little about your family.

I have been married to my wife Clara Ann for 43 years. We have two children, a 36 year old son and a 31 year old daughter, plus the apple of our eye, a seven month old grandson.

Q: What do you enjoy doing when you're not practicing law or working for the State Bar?

I am a bit of a techno-nerd. I love computers, tablets, and other electronic devices. I'm afraid I'm somewhat guilty of buying every new thing that comes on the market. I also like to hunt and play golf occasionally. I love to visit my kids and my grandson, and hope for more.

Q: How would you like for your administration to be remembered when the history of the State Bar is finally written?

I hope that during my administration we are able to overturn the Dental Board decision. Other than that, probably the best any administration can hope for is not to be remembered for anything. That means that nothing controversial came up that had to be dealt with, and that the work we did was generally satisfactory to both the public and the profession. I hope that is the way my administration is viewed. ■

Becoming Jackie (cont.)

Things that he didn't take with him. Mother yanked one of his old belts off a hook. She slammed the closet door and little balls of dust puffed up from the floor.

Mother was crying and hitting me with the belt and telling me that I didn't know what I had done. And I thought that she had no idea, no idea about anything. But I was crying too, and I didn't stop until I looked in the mirror, and I saw Jackie. ■

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Stuck? Take a Quick Inventory.

By Don Carroll and Robynn Moraites

Social scientists have researched and examined the relationship between material well-being and emotional well-being or happiness. For most of the world, greater levels of material wealth have led to greater levels of perceived emotional well-being—most everywhere, that is, but in the United States. (*The Atlantic,* January/February 2003). In the United States, the total numbers of those who categorize themselves as "very happy" have declined over the period of time in which the median family income has nearly doubled.

Robert Lane, a professor at Yale, argues that the leveling off of and diminishment of happiness with rising income reflects the trade-off between the two primary sources of happiness—material comfort and social and familial intimacy. Modern economic development increases wealth by encouraging mobility, commercializing relationships, and giving us families in which all adults work. The result is greater incomes, but weakened social and familial ties. In less developed countries, the improvement in material benefit more than offsets the declines in social connectedness. At some point, however, the balance tips and Lane believes this has occurred in the United States. He thinks that the United States will continue to become unhappier in the future as incomes rise. Lane cites as one basis for his argument the rise we are seeing in the incidence of clinical depression.

Depression is a disease of isolation, in both cause and effect. Depression can result from several causes. Some causes may be purely chemical. Often, however, depression results from our emotional responses (or more frequently, our suppression or avoidance of normal emotional responses) in the context of familial and social relations, regardless of whether these relations appear to outsiders as "close" or "estranged." Many people, especially lawyers, report feeling isolated, even with what others would perceive to be strong family or social ties. Many of us have had the experience of feeling "lonely in a crowd of people."

There are certainly well-known aspects of the legal profession that lend themselves to promoting a sense of emotional isolation from friends and family. Today's business culture and its preoccupation with the almighty billable hour can leave little time or, more importantly, emotional energy for much else in a lawyer's life. Sometimes, lawyers may find themselves representing people, causes, or institutions with whom they do not personally agree, yet in order to be zealous advocates and successful, they must distance themselves from their own feelings about the client or the circumstance. Of course, the problem is that one cannot selectively shut down or push away only certain feelings. The lone viable option is to turn the emotional awareness and feeling switch into the "off" position, thus creating the unintended collateral consequence of not being able to be emotionally connected when one may actually want to be.

If you do not experience happiness regularly in normal times, then start the year with an emotional inventory. Here are some questions to help you in taking that inventory:

1. What is the quality of your thoughts?

There is just no getting around the powerful connection between what you think and what you experience emotionally. Negative thoughts tend to create negative emotional experiences. Depression (and addiction) thrives in an atmosphere of negative thoughts. The difficulty, of course, is in how one changes negative thinking patterns. It is surprising to many of the lawyers we work with to learn that thinking is not changed by thinking. Taking different actions and changing old behavior patterns that underlie negative beliefs are what can cause the quality of one's thoughts to change. There is a slogan often used in early recovery, "Act your way into a new way of thinking." Often we do not realize the extent to which our actions are promoting and reinforcing our negative thinking patterns until we are willing to do something different and take a different action.

2. Do you try to control what you have no control over?

Depression is often connected to a sense of apathy or powerlessness. But often that feeling of being powerless stems from a frustrated emotional need to control what cannot actually be controlled. None of us can control whether our children are happy, although we go to great lengths to try to make them happy. We can be zealous advocates and bring every skill and resource we have to bear on a case, but we cannot control whether or not our case is ultimately successful. We can take actions to support any desired outcome, but in the end, there is very little we can control in the world besides our own attitudes and actions. The need to control beyond what one actually influences usually reflects the presence of some underlying fears. These fears tend to isolate us and must be faced in order for them to lose their power.

3. Do you mostly react?

There is a lot we have no control over, but there are some things we do have the ability to control or influence. One aspect of depression is the skewed impression that you have no control over the things that you do have some control. For example, you really do control where you work and the kind of job you have. People usually have a number of options. A depressed lawyer sees he has no choice but to work in a firm he hates for long hours or be unemployed. If you don't see more than two options as solutions to a problem, you are looking at it through a distorted lens.

4. How good is your self-care?

Many of us over time learn to treat ourselves poorly. We eat a lousy breakfast or no breakfast. We don't get a full night's sleep. Or we don't exercise. Over time, bad habits involving eating, sleeping, and/or exercise are almost guaranteed to cause major health problems and are a significant factor in contributing to ongoing depression. Interestingly, making deliberate improvements in these three arenas (diet, exercise, and sleep) are a superb non-pharmaceutical way to prevent and begin to treat depression.

5. Do you nurture your spirit?

Time for work and for sleep always make it into the schedule even if the amount of time for each is badly skewed. Just as important for our spirit, however, is time for learning, relationships, and solitude.

We are in a profession that requires constant learning, but if learning in our profession does not stimulate us, we need to spend time learning in areas that do. Time for relationships gets to the heart of Professor Lane's argument. It is just like watering your tomatoes in the summer. If you don't learn to spend some time each day devoted to experiencing those relations that are important to you, then your vines will wither.

Every study shows that those individuals with active spiritual lives and practices—be it practices more secular like yoga or some forms of meditation, or more religious like regular church worship—have a significantly greater degree of happiness. The types of social relation networks that go with these activities also provide a guard against isolation in times of stress.

6. Did you laugh today?

A major pitfall for many of us as lawyers is taking ourselves too seriously. Humor helps people connect and can do more to nourish our spirit than years of talk therapy. Lack of humor over time becomes a sort of social dry rot. Find a way to connect and laugh with good friends.

7. What did you look forward to today?

An indicator of an unlived life with an emotional disconnect is a life that seems to be just automatically trudging along on its own in auto-pilot mode. After a while life gets pretty isolated as one's feelings become more and more remote from what is actually happening. Set up something different and spontaneous to look forward to today. Shake it up a bit. Change is good and can reconnect us with ourselves emotionally as we have a new experience.

8. What do you look forward to tomorrow?

Just as bad as having no hopes for the future, is to have unrealistic expectations. You can't enjoy life if you are continually focused on that one personal injury case finally coming in that is going to get your practice over the hump. The legal profession is terrible about reinforcing the notion, "I will be happy when...." You can fill in the blank: when I get to law school, when I get a good job, when I make partner, when I earn XYZ, when I secure this new client. The list is endless. Future goals are certainly good and worthwhile, but not when we disconnect from happiness and satisfaction today for a future payoff that never comes. (Happiness never "comes" because once we've attained whatever "it" is, we begin looking ahead to the next thing that is "going to make us happy.") This is a good time of year to stop chasing a future event and to re-evaluate priorities to assure that they are not only reasonable but also enhance all aspects of your life.

9. What do you do that makes you happy?

Some people answer this question with enthusiasm. Others are stumped. It is an important question. The answer is whatever gives vitality, energy, and meaning to your life.

10. With whom do you share your true self?

Many lawyers put so much effort into their lawyer persona that they lose a sense of who they really are. Gradually and unconsciously identifying with a persona allows core and critical parts of a person to be repressed. Denying who you are, or parts of yourself, often leads to depression, addiction, and/or problems with relationships.

Once you determine how you did on this inventory, the next and most important step is how to make a change. Most people truck along until the heart attack occurs, their drinking gets them into trouble, or their depression brings them to the psychiatrist's office. We usually don't change without severe pain motivating us to do something different. It doesn't have to be that way. Small incremental changes can often bring great relief, but they must address basic patterns. We must get help in identifying and accurately seeing those patterns, and then with understanding and dealing with our own resistance to a change, even those we know we need to make for the better. If you feel stuck in some of the ways described, the Lawyer Assistance Program is a confidential and free resource to help get you started down a new road. ■

The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers, judges, and law students, which helps address problems of stress, depression, alcoholism, addiction, or other problems that may lead to impairing a lawyer's ability to practice. If you would like more information, go to nclap.org or call: Cathy Killian (for Charlotte and areas west) at 704-892-5699, Towanda Garner (in the Piedmont area) at 919-719-9290, or Tony Porrett (for Raleigh and down east) at 919-828-6425.

Additional Cy Pres Funds Increase Funds Available for Grants

Income

NC IOLTA continues to ride the good news/bad news roller coaster regarding income. For the good news—we reported 2012 total income exceeding $3 million for the first time since 2008, but only because of the $1.2 million received from residual funds of a class action case. The picture for our traditional income sources remains bleak, though additional cy pres funds have improved the income picture for 2013.

IOLTA Account Income—Income from IOLTA accounts for 2012 decreased by almost 14% and was under $2 million for the first time since 1994. Income for 2013 from the accounts has decreased by another 10% through the first two quarters of the year. We expect this situation to continue as banks re-certify their comparability compliance at lower interest rates. We do not expect this situation to change until interest rates go back up and transactions increase.

Settlement Agent Accounts—The amendment to the Good Funds Settlement Act (N.C. Gen. Stat. §45A-9) requiring that interest bearing trust and escrow accounts of settlement agents handling closing and loan funds be set up as IOLTA accounts took effect on January 1, 2012. Though many of these accounts are not interest bearing and are not being set up as IOLTA accounts, we have identified around 50 new accounts as settlement agent only accounts (those not associated with an attorney licensed in North Carolina), from which we received over $35,000 in 2012 and just under $18,000 through August 2013. We will, of course, receive more from these accounts when transactions and interest rates increase. However, we expect no large increase unless establishing these accounts with IOLTA is made mandatory.

Cy Pres Funds—We are now heavily relying on funds from cy pres court awards to improve our income picture. In 2012 we received over $1.2 million from residuals directed to IOLTA programs across the country in a Washington state class action case. The court found that these entities promote access to the civil legal justice system, something that class members needed.

In 2013 we received over $650,000 in cy pres funds. In February we received almost $130,000 in cy pres from a class action case filed in Buncombe county in 2004. Because the class included a large number of difficult to identify consumers suffering only small monetary losses, the settlement provided for a cy pres distribution in lieu of a claims process. With court approval, the funds were distributed to regional charitable organizations so that the funds could be expended for the benefit of citizens in the settling five states. In NC, the funds were divided equally among NC IOLTA at the NC State Bar (for civil legal aid), Pisgah Legal Services in Asheville, Habitat for Humanity, and IDS.

In September we received over $525,000 from three class action cases settled in 2010 that challenged the legality of payday lending in North Carolina. After paying out over $28 million to class members, approximately $1 million in residual funds remained to be divided equally between the Indigent Person's Attorney Fund (IDS) and the State Bar's IOLTA program following the North Carolina statute that sets out such a procedure for distributing class action residuals.

The Equal Access to Justice Commission (EAJC) has published a manual on *Cy Pres and Other Court Awards* to educate judges and attorneys as to the importance of such awards to legal aid organizations. The manual includes information on different types of court awards, tips for structuring award agreements, examples of awards, and a primer on how to structure a cy pres settlement. The manual is available on the NC Equal Access to Justice website, ncequalaccesstojustice.com, and the NC IOLTA website, nciolta.org.

Grants

Beginning with the 2010 grants, we have limited our grant-making to a core group of (mainly) legal aid providers. Even with that

restriction and using almost $2.4 million in reserve funds over three years, grants have dramatically decreased (by over 40%), and by the end of 2012, our reserve fund was depleted to under $450,000. Receiving the $1.2 million in cy pres funds in 2012, however, meant that we were able to keep 2013 grants steady at the 2012 level of $2.3 million without using any additional funds from reserve. And, in fact, we were able to replenish the reserve to just under $1 million. Those reserve funds and the additional cy pres income received in 2013 will assist in making grants for 2014.

Grantee Spotlights—We are continuing to highlight the work of our grantees in Grantee Spotlights. Look for these articles in the State Bar *Journal,* or access them on our website. We are focusing on work where more than one program can be highlighted.

State Funds

In addition to its own funds, NC IOLTA administers state funding for legal aid on behalf of the NC State Bar. State funding has decreased due to reductions to both the appropriated funds and the filing fee allocations. Total state funding distributed for calendar year 2012 was $3.6 million, decreased from $4.4 million in 2011. We have distributed $2.8 million to date for the 2013 calendar year. The Equal Access to Justice Commission, the legal aid programs, and the NCBA continue to work to sustain and improve the funding for legal aid. ■

Volunteer Phone Hotlines Expand Service to Legal Aid Clients

The profession has memorialized our expectation for *pro bono* service in Rule 6.1: "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of *pro bono* public legal services per year." *NC Rules of Prof'l Conduct Rule 6.1 (2003).* Or, as former NCBA President Martin Brinkley put it in his inaugural address, "That work is one of the title deeds to which each of us took delivery when we applied for a license to practice law."

Support for *pro bono* service has been an important part of NC IOLTA's grant-making from its inception in the mid-1980s. Broadening its support in 1992, the program proactively offered to make grants to volunteer lawyer programs being established across the state based on a per lawyer formula to make sure that volunteer lawyer assistance could be provided state wide. Support for such programs has continued, and, through 2013, NC IOLTA has granted over $10 million to support such programs. Today, lawyers around the state are expanding their *pro bono* service to legal aid clients through innovative hotline programs that allow them to dispense advice and brief counsel by phone.

Pisgah Legal Services Volunteer Lawyer Program—Pisgah Legal Services (PLS) in Asheville runs an exceptional volunteer lawyer program (VLP). They are able to improve the lives of more than 13,000 low-income people annually with the generous *pro bono* contributions of volunteer lawyers through the Mountain Area Volunteer Lawyers Program (MAVLP). MAVLP is a *pro bono* referral program made up of more than 300 active private attorneys who volunteer their services to help meet the need for civil law representation of low-income residents of Buncombe, Henderson, Madison, Polk, Rutherford, and Transylvania Counties. In fact, the VLP accounts for approximately one-fifth of closed cases at Pisgah Legal Services. In 2012 alone, volunteer MAVLP attorneys donated 3,643 professional hours to help PLS clients meet their basic needs, a service modestly valued at $546,460. Recognition has also followed. The NCBA's Chief Justice Award has been bestowed upon the program three times since 1995, and the MAVLP received the Governor's NC Outstanding Volunteer Award in 2003.

In the mid 1980s the Mountain Area Volunteer Lawyers Program was formally established as a cooperative effort between Pisgah Legal Services and private attorneys in their six-county service area. IOLTA has provided funds for the program since 1992. They use a team approach, developing groups of private attorneys to handle the most needed types of poverty law cases and offering support, mentoring, and training from the staff attorneys knowledgeable in those substantive areas (e.g. landlord/tenant; benefits, domestic violence, workers' comp, homeownership/consumer, elder law, and non-profits).

Pisgah Establishes a Hotline—In 1996, Pisgah Legal Services received additional support from IOLTA to establish a legal "hotline" for intake and brief advice, based on one they had seen operating in Virginia. The hotline is staffed by trained attorney volunteers who provide intake and legal advice to clients over the phone. Before participating as a hotline volunteer, an attorney participates in a free nine-hour CLE program reviewing the fundamentals of poverty law. In addition, PLS provides each volunteer with a hotline reference manual. Volunteers sit with mentor volunteer attorneys as they gain confidence in the advice that they give, and their advice is reviewed by PLS staff attorneys afterwards. Some volunteers work from their offices; others prefer to serve at a PLS office.

Ward Hendon, a former trustee and chair of the NC IOLTA Board, was one of the original volunteers for the hotline program. "The hotline attorneys enjoy the work so much that they volunteer a number of years," says Hendon. "We find that many people can prevent or solve serious problems with well-timed advice by attorneys. And, thanks to the increased capacity provided by hotline volunteers, PLS staff attorneys can concentrate their efforts on cases involving extended legal services."

This group of volunteers is now one of the MAVLP teams. "The hotline volunteers increase substantially the number of people that can be served through the Mountain Area Volunteer Lawyer Program and Pisgah Legal Services," according to PLS Executive Director Jim Barrett.

Legal Aid of NC Volunteer Lawyer Program—Legal Aid of NC (LANC) is the statewide, federally funded legal aid program in North Carolina. They now administer volunteer lawyer programs statewide using a taskforce that meets to exchange ideas and receive training under the supervision of two experienced VLP coordinators designated as private attorney involvement (PAI) practice group managers. However, they allow each office to manage its own local program to respond to the local bar and circumstances. They employ 12 VLP coordinators who are responsible for recruiting volunteer attorneys, interviewing clients, coordinating and tracking case referrals, closing cases, maintaining VLP records and statistics, coordinating presentations for client and community groups, organizing CLE events, and arranging appropriate recognition for attorneys. Managing attorneys in each office directly supervise the VLP coordinator. In addition to providing *pro bono* referrals of individual cases to private attorneys, some offices have developed other means of using volunteers to increase legal assistance to low-income clients, such as handling intake and brief advice, staffing clinics to handle particular types of cases, establishing law firm projects, and educating clients.

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Size Matters

By Suzanne Lever

One of the ethics rules that causes the most consternation for lawyers and members of the State Bar's grievance department is Rule 7.3. The particular culprit is Rule 7.3(c), dealing with written, recorded, or electronic "targeted communications."

Rule 7.3(c) provides:

(c) Targeted Communications. Unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), every written, recorded, or electronic communication from a lawyer soliciting professional employment from a potential client known to be in need of legal services in a particular matter shall include the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (the advertising notice) subject to the following requirements:

(1) Written Communications. Written communications shall be mailed in an envelope. The advertising notice shall be printed on the front of the envelope, in a font that is as large as any other printing on the envelope. The front of the envelope shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice shall also be printed at the beginning of the body of the letter in a font as large as or larger than any other printing contained in the letter.

The first source of confusion tends to be whether or not a particular communication is a "targeted" communication requiring the advertising notice.

Pursuant to Rule 7.3, a communication is "targeted" if it (1) is sent from a lawyer; (2) to solicit professional employment from; (3) an individual who is not a lawyer and does not have a family, close personal, or prior professional relationship with the lawyer; and (4) the individual is known to be in need of legal services in a particular matter. *See* Rule 7.3(a) and (c). If any one of these four factors is not present, the communication is not targeted and the communication does not have to contain the advertising notice.

RPC 98 provides clarification as to whether a communication is sent to an individual known to be in need to legal services "in a particular matter":

> For the purposes of [Rule 7.3], the term "in a particular matter," has reference to discrete factual incidents directly involving the prospective client of which the communicating lawyer has acquired knowledge. The rule was not intended to apply to communications sent to clients who, because of their mere existence in a complex and ever-changing legal environment, may need legal advice and assistance in maintaining compliance with existing law.

A classic example of a targeted communication is one sent to the recent recipient of a speeding ticket offering to handle the ticket. In contrast, a letter of introduction sent to everyone in a particular zip code offering services related to speeding tickets, does not require the advertising notice.

Another source of confusion, somewhat inexplicably, is the requirement that written targeted communications must be mailed in an envelope. Comment [7] to Rule 7.3(c) reiterates that "[p]ostcards may not be used for targeted mail solicitations." This requirement protects private and/or potentially embarrassing information from disclosure to third parties. Not sure what else I can say about it. If you have questions, give me a call.

Moving on. Rule 7.3(c) provides that the *front* of the envelope cannot contain any printing "other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice." 2007 FEO 5 was adopted as a result of uncertainty as to this particular prohibition. 2007 FEO 5 provides that the front of an envelope may display an insignia or border used in connection with the law firm's name, if the insignia or border is used consistently by the firm in official communications on behalf of the firm. Mottos and website addresses are still a no-no on the front of the envelope. *Id.* These items, as well as other extraneous statements, may be printed on the back of the envelope so long as they comply with the printing requirements discussed below.

As to the "stuffing" of the envelope, Rule 7.3(c) currently provides the advertising notice must be "printed at the beginning of the body of the letter in a font as large as or larger than any other printing contained in the letter." Because of confusion as to the required location of the disclaimer, 2007 FEO 15 was adopted. 2007 FEO 15 clarifies what is meant by the "body" of the letter:

> Black's Law Dictionary, 5th Edition (1979), defines "[b]ody of an instrument" as follows: "The main and operative part; the substantive provisions, as distinguished from the recitals, title, jurat, etc." Consistent with this definition, the body of a letter is that part of the letter that appears below the salutation. However, the Rules of Professional Conduct, being rules of reason, should be interpreted and applied in a reasonable manner. Rule 0.2, Scope, cmt. [1]. Therefore, the requirement in Rule 7.3(c) that the advertising notice "be printed at the beginning of the body of the letter" is satisfied if the advertising notice appears anywhere between the top of the page to immediately below the salutation of a direct mail letter.

The most technical aspect of the rule pertains to the characteristics of the advertising notice itself. The current rule provides that the advertising notice must be printed in capital letters on the front of the envelope "in a font that is as large as any other printing on the envelope" and at the beginning of the body of the letter "in a font as large as or larger than any other

printing contained in the letter."

This particular requirement of the rule has, unfortunately, been the basis for numerous grievances filed against lawyers. In an effort to clarify this portion of the rule, a proposed rule amendment is pending. The purpose of the amendment is to specify that the advertising notice must be conspicuous and must match in *size, color, and type* the largest and widest of the fonts used on the front or back of the envelope or the enclosed written communication.

Why the need for such specificity? Because these two statements are the same font SIZE:

> THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES (Comic Sans – 10)
>
> THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES (Gabriola – 10)

And these two statements are the same font size and type:

> THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES (AGaramond – 10)
>
> THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES (AGaramond – 10)

Obviously, there are ways to manipulate the color and type of font to make fonts of the same size appear more or less conspicuous. Therefore, the proposed rule provides that the advertising notice must meet the following requirements:

> The advertising notice shall be printed on the front of the envelope, in a font that is as large as any other printing on the front or the back of the envelope. If more than one color or type of font is used on the front or the back of the envelope, the font used for the advertising notice shall match in color, type, and size the largest and widest of the fonts. The front of the envelope shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice shall also be printed at the beginning of the body of the enclosed written communication in a font as large as or larger than any other printing contained in the enclosed written communication. If more than one color or type of font is used on the enclosed written communication, then the font of the advertising notice shall match in color, type, and size the largest and widest of the fonts. Nothing on the envelope or the enclosed written communication shall be more conspicuous than the advertising notice.

Proposed Amendment to Rule 7.3(c) as published in State Bar *Journal*, Fall 2013.

The goal is conspicuousness for the advertising notice. To drive this point home, the proposed amendment to comment [7] to Rule 7.3(c) provides, in part:

> [The advertising notice] must appear on the front of the envelope with no other distracting extraneous written statements other than the name and address of the recipient and the name and return address of the lawyer or firm...On any paper or electronic communication required by this rule to contain the advertising notice, the notice must be conspicuous and should not be obscured by other objects or printing or by manipulating fonts. For example, inclusion of a large photograph or graphic image on the communication may diminish the prominence of the advertising notice. Similarly, a font that is narrow or faint may render the advertising notice inconspicuous if the fonts used elsewhere in the communication are chubby or flamboyant. The font size requirement does not apply to a brochure enclosed with the written communication if the written communication contains the required notice. As explained in 2007 Formal Ethics Opinion 15, the font size requirement does not apply to an insignia or border used in connection with a law firm's name if the insignia or border is used consistently by the firm in official communications on behalf of the firm. Nevertheless, any such insignia or border cannot be so large that it detracts from the conspicuousness of the advertising notice.

Id.

Clear as mud? We hope it is clearer. The proposed rule amendment will be presented to the North Carolina Supreme Court for approval after the State Bar Council meeting in January. Approval of the Court is anticipated in March 2014. ■

Suzanne Lever is assistant ethics counsel for the North Carolina State Bar.

Meet the Federal Judges (cont.)

issues are addressed. And he recognizes that sentencing of a criminal defendant is a very significant event in the life of an accused "where the legal system interfaces with social interaction."

What does Judge Reidinger like best about his role as a federal district court judge? "No timesheets!" Also he appreciates the variety of cases that come before him. After years of a practice which inevitably became more focused, he sees himself as more of a generalist. Following that theme, he sees his law clerks as fellow lawyers collaborating with him in a small firm environment.

As a practicing attorney Reidinger served as secretary-treasurer and president of the local bar, as well as chair of the NCBA Local Bar Services Committee and the Bar Leadership Institute. He maintains his law license by attending seminars for judges. He does sense a certain amount of isolation in his position and still feels the silence that surrounds him in the Federal Building, which he describes as a "mausoleum." He does hold court in Bryson City, which provides some interaction outside the courthouse in Asheville.

Even family life is relatively quiet for Judge Reidinger. Two of his daughters have graduated from college and work as educators and the third is presently in graduate school. What does bring some excitement is interacting with his son, who is a sophomore in high school. This young man is on a rowing team and together they travel some weekends to various sites in order to compete.

As one would expect, when asked what he sees as the role of a judge, Reidinger's response is thoughtful and carefully crafted: "To make sure that disputes presented to the court are resolved according to the law, fairly and expeditiously." ■

Michelle Rippon is of counsel with Constangy Brooks & Smith in Asheville. She is also an adjunct professor in the Business Management Department at UNC-Asheville.

Profiles in Specialization—Chris Fialko

By Denise Mullen, Assistant Director of Legal Specialization

I recently had an opportunity to talk with Chris Fialko, a board certified specialist in state and federal criminal law practicing in Charlotte. Chris attended Stanford University, earning his undergraduate degree in economics, and subsequently received his law degree from the University of North Carolina at Chapel Hill. Following graduation he spent a few years working in a civil litigation firm where he routinely was asked to handle any criminal work that others did not want. Chris recognized his passion for criminal law, so he left the firm to open a solo practice handling criminal defense cases. In 1999 he joined Rudolf & Maher, which is now Rudolf, Widenhouse and Fialko, with offices in Chapel Hill and Charlotte. He became a board certified specialist in state and federal criminal law in 2002. Following are some of his comments about the specialization program and the impact it has had on his career.


Fialko

Q: Why did you pursue certification?

There were three incentives that led me to pursue certification. First, Eben Rawls approached me and strongly suggested—ordered—that I apply to sit for the exam. His confidence in me was much appreciated, and I now find myself encouraging others in the same way if I think that they are really good. Second, I was looking for a way to distinguish myself from others. I thought that if I could pass the exam, I could certainly use that information in my marketing efforts. Third, I had been in practice for about ten years and I was curious. I wondered if I had achieved that level of competence.

Q: How did you prepare for the examination?

I took several days off and read all of the North Carolina Criminal Code, Chapters 14, 15, and 15A. I read every word and it was a great exercise. Since I had applied for both the state and federal criminal law exams, I also took one day to read Chapter 18 of the Federal Criminal Code and focused on the evidence and ethics rules. I also read through the practice questions online. I remember that there were a few questions on the exam that I particularly liked. I felt that they were written by practicing attorneys, not professors, and I appreciated that distinction.

Q: Was the certification process valuable to you in any way?

Reading the code was a valuable experience. I have continued that practice each January since the exam. As a criminal lawyer, you work so hard on your cases and are typically so busy, it would be easy to let it slip by. But it is so important to take the time to review the code and the new laws that come out every year to maintain your knowledge and guide your practice.

Q: Has certification been helpful to your practice?

As I anticipated, the certification has been helpful to my practice, especially marketing my practice. I find that I get a lot of referrals from other attorneys who know that I am board certified. My clients are not often aware of the certification initially, but when they find out, it gives them a sense of confidence about my ability to handle their cases.

Q: What are your best referral sources?

I get the majority—probably about 90%—of my referrals from other lawyers. Many of those lawyers are also board certified in their fields. I'll ask how they found me and they'll often tell me it was the directory of board certified lawyers, either the printed booklet or the online version. I also routinely use the directory to make referrals to other board certified specialists throughout the state. Particularly if I don't personally know a lawyer in that geographical region, I can count on the directory.

Q: How does certification benefit your clients?

In a complex case there has to be a level of trust between the client and the attorney. That trust is often hard to develop in a criminal case. The knowledge that I am board certified helps to establish that trust with my clients early in the process, which substantially benefits both the client and the case.

Q: Are there any hot topics in your specialty area right now?

One hot topic—that I hadn't really anticipated—is the need for criminal lawyers to be proficient in immigration law. Over the past few years I have had to develop strong relationships with lawyers who are board certified in immigration law. I find that I call on them at least once a week to discuss how a potential conviction will affect my client's immigration status.

Q: How do you stay current in your field?

There are a few resources that I use on a regular basis. One is the monthly magazine that the National Association of Criminal Defense Lawyers publishes. It's called *The Champion,* and it is an invaluable resource that provides the latest developments on a wide range of topics including search and seizure, grand jury proceedings, death penalty, and white collar crime. I also use the listserve sponsored by the North Carolina Advocates for Justice on a regular basis. It's like having a daily continuing legal education (CLE) course with a constant stream of case law and strategy questions and answers that provide really good information.

I have also adjusted my approach to CLE over the past few years. I look for courses that will be challenging, not just provide required hours. I was recently appointed to the North Carolina Sentencing Commission and I look forward to those meetings as an opportunity to learn everything that the legislature is doing on a monthly basis.

Q: Is certification important in your practice area?

Yes, although there are some really good criminal lawyers who are not board certified. For me, becoming a certified specialist helps

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Top Tips for Trust Accounting—Get Active with Your Inactive Balances

Rule 1.15-2(q) Abandoned Property

If entrusted property is unclaimed, the lawyer shall make due inquiry of his or her personnel, records, and other sources of information in an effort to determine the identity and location of the owner of the property. If that effort is successful, the entrusted property shall be promptly transferred to the person or entity to whom it belongs. If the effort is unsuccessful and the provisions of G.S. 116B-53 are satisfied, the property shall be deemed abandoned, and the lawyer shall comply with the requirements of Chapter 116B of the General Statutes concerning the escheat of abandoned property.

According to the reports submitted by our new State Bar random auditor, Anne Parkin,[1] lawyers are not properly dealing with inactive balances in their trust accounts. These inactive balances are usually the result of (1) outstanding checks that have never cleared, (2) earned fees that were never removed, or (3) funds that cannot be identified due to poor record keeping. Here are some tips to deal with these three situations:

1. Outstanding Checks

A review of the past quarter's audit reports shows that lawyers are retaining funds in their trust accounts from outstanding checks dating as far back as 2003. These outstanding checks were most likely lost, thrown away, or perhaps never even mailed. There are several ways to address the problem of trust account checks that are not cashed for a significant period of time. Some lawyers have "Void after 90 Days" printed on trust account checks to persuade payees not to hold the checks, but that notation does not guarantee that the bank will not honor the check after 90 days. This issue should be addressed with the bank in advance. Other lawyers contact all recalcitrant payees who fail to negotiate a trust account check after a certain period of time (usually six to nine months). Certified mail should be used if warranted by the amount of the check. If the payee cannot be located or a reply is not received within a reasonable time, the check is voided or a stop payment is placed on the check. The stop payment charge has to be paid and a stop payment order is usually good for only six months. If the check is voided, it may still be negotiable. Therefore, a stop payment order may only be appropriate depending on the amount of the check. If a stop payment order is placed on a check, it is possible that the check may still be cashed, so the bank's procedures for stop payment orders should be understood in advance. After payment is stopped on a check, the funds are noted as returned on the client's ledger card. There is not a restriction on issuing a second trust account check.

While there is really no 100% safe way to deal with the issue of writing two checks, a lawyer should use his judgment based on the amount of the check, the sophistication of the payee, and his ability to communicate with the payee. If, in the lawyer's judgment, it would be impractical to issue a stop payment order or cancel the check because of the amount, a lawyer may decide that it is appropriate to simply re-issue a new check to the client. However, if the lawyer issues a second check, the lawyer will be required to reimburse the trust account if for some reason the client subsequently cashes the first check. Remember, a lawyer is not permitted to mail the client cash, money orders, or cashier's checks in an effort to absolve himself of fiduciary responsibilities.

One potential solution to the issue of outstanding checks is for the lawyer to charge a reasonable dormancy fee against the unclaimed funds. This is permitted, so long as (1) the client receives prior notice of and gives written consent to the dormancy fee, (2) the amount of the fee is appropriate under Rule 1.5(a) of the Rules of Professional Conduct, and (3) the fee complies with the statutory requirements of G.S. 116B-57(a) and any other restrictions imposed by the Unclaimed Property Program of the State Treasurer's Office. For more information, and sample fee agreement language, see 2006 Formal Ethics Opinion 15.

2. Earned Fees in Trust Account

Rule 1.15-2(f) describes the two types of personal funds that a lawyer may keep in the trust account. They are: (1) funds sufficient to open or maintain the account, and (2) funds belonging in part to a client or other third party and in part currently or conditionally to the lawyer. Apart from these kinds of deposits, or a deposit to correct an error or negative balance, a lawyer's funds should not be in the trust account. Compliance with this prohibition requires the prompt removal of earned fees.[2] A practical reason to promptly remove earned fees is that, over time, a lawyer may lose track of what money he is entitled to and what is owed to a former client.

If a lawyer believes that trust account funds are earned fees that the lawyer failed to remove, the lawyer may withdraw those funds only if he can verify and document that he is entitled to the funds. Mere suspicion and belief, even a very strong belief, is not enough to justify the withdrawal of the funds. If the lawyer cannot prove that he is entitled to the funds and cannot attribute the funds to a particular client, then the lawyer must follow the provisions of G.S. 116B for the escheat of abandoned property and escheat those funds to the State Treasurer's Office.

3. Unidentified Funds

Rule 1.15-2(q) is very clear on this subject. The lawyer must make a diligent attempt to determine the identity and/or location of the owner of the funds. This attempt entails examining client files, searching for address information, and reviewing old trust account records in an effort to determine and locate the owner of the funds. If, after a diligent

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Lawyers Receive Professional Discipline

Disbarments

Henry V. ("Van") Barnette III of Raleigh surrendered his license and was disbarred by the Wake County Superior Court. Barnette falsely reported to his law firm billable time for legal services he did not perform. The false entries, which occurred in at least 15 different client matters, amounted to approximately $10,000 in billable hours, some of which was collected from Barnette's clients.

J. Lee Carlton Jr. of Raleigh surrendered his license and was disbarred by the Wake County Superior Court. Carlton knowingly prepared HUD-1 Settlement Statements that did not accurately show the disbursements in FHA insured real estate transactions. He pled guilty in the United States District Court for the Eastern District of North Carolina to making false statements to HUD in violation of 18 U.S.C. § 1012.

David Shawn Clark of Hickory pled guilty in Catawba County Superior Court to two counts of misdemeanor communicating threats and one count of common law obstruction of justice. The DHC concluded that he engaged in a sexual relationship with a client who was a victim of domestic violence; asked the client to lie and deny the sexual relationship so Clark could defend against an alienation of affection lawsuit threatened by the client's husband; when she refused to lie, threatened the client with using information he had obtained during the attorney-client relationship to cause her to lose custody of her children; threatened to kill his legal secretary after she refused to lie about her knowledge of the sexual relationship; filed a verified complaint in support of a frivolous lawsuit against his client alleging falsely that he did not have a sexual relationship with the client and alleging that the client defamed him by saying otherwise; revealed confidential client information in the defamation lawsuit; and made false statements to the Grievance Committee. The DHC announced its decision to disbar Clark.

David Duke of Raleigh misappropriated entrusted funds, neglected multiple clients, and did not respond to the State Bar. He surrendered his license and was disbarred by the DHC.

Phillip Gilfus of Fayetteville misappropriated funds belonging to a civic organization while serving as its treasurer. He was disbarred by the DHC.

Matthew J. Lester of Charlotte surrendered his license and was disbarred by the Wake County Superior Court. Lester misappropriated funds from his trust account.

Suspensions & Stayed Suspensions

William Belk, a former district court judge from Charlotte, was removed from office by the Supreme Court for making false statements to the Judicial Standards Commission. The DHC announced its decision to suspend Belk for three years. After one year, Belk may petition for a stay of the balance upon compliance with conditions.

Ashley Cannon of Winston-Salem did not provide a candid statement of fact in her application for a domestic violence protective order against her former boyfriend. She also did not testify candidly in the hearing on that order. The DHC suspended Cannon for two years. The suspension is stayed for two years upon her compliance with numerous conditions.

Marshall Dotson III of Asheboro neglected three clients. He was suspended by the DHC for five years. After serving one year active suspension, Dotson may petition for a stay of the balance upon compliance with numerous conditions.

Jason Gold of Raleigh represented a couple in a loan transaction. After the closing, Gold discovered that one of the clients had not signed all closing documents. With her consent, he signed her name on five documents and notarized or acknowledged her purported signature. Gold made false statements to the Notary Enforcement Section of the Secretary of State's Office and signed an affidavit containing false statements that his clients' adversary used in support of summary judgment. The DHC suspended Gold for five years. After serving two years active suspension, Gold may petition for a stay of the balance upon compliance with numerous conditions.

In 2005 **Rex Gore** of Shallotte was the elected district attorney in the 13th prosecutorial district. He entered into an agreement to hire Elaine Kelley of Linden to serve as a senior assistant district attorney. In addition to salary, Gore and Kelley agreed that Kelley would be compensated by reimbursement of mileage she did not incur. After entering into this agreement, Kelley submitted 63 expense reports containing false certifications of mileage and received purported reimbursement of $14,190.39 for mileage she had not driven. Gore pled guilty to the criminal charge of willful failure to discharge the duties of his office. As part of his plea agreement, he was suspended for six months by the Brunswick County Superior Court.

After **Scott David Beal** of Winston-Salem was suspended for two years by the Illinois Supreme Court, the Grievance Committee entered an order of reciprocal discipline suspending his license to practice law in North Carolina for two years. Beal's misconduct included lack of diligence and failure to deliver entrusted funds promptly. Beal's reinstatement in North Carolina is conditioned on his reinstatement in Illinois.

Show Cause Orders

In February 2013 the DHC suspended **Thomas Clements** of Fayetteville for two years because he did not inform his clients that he was administratively suspended and did not properly wind down his law practice. The suspension was stayed for two years upon compliance with numerous conditions. Clements violated several conditions. The DHC entered a consent order activating the two-year suspension.

In March 2013 the DHC suspended **Wilbur Linton** of High Point for two years because Linton did not maintain required trust accounting records. The suspension was stayed for three years upon compliance with numerous conditions. Linton violated several conditions. The DHC entered a consent order activating the two-year suspension.

Interim Suspensions

The chair of the DHC entered an order of interim suspension in the case of **Kia Narissa Scott** of Concord. Scott pled guilty to common law obstruction of justice, a criminal offense showing professional unfitness.

Censures

Camilla J. Davis of Durham was censured by the Grievance Committee. Davis' fee agreement improperly indicated that she had an absolute right to withdraw. Davis did not give notice of appeal for her client and did not take steps to protect her client's interests when she withdrew.

Clarke K. Wittstruck of Asheville was censured by the Grievance Committee. Wittstruck charged an improper fee, did not participate in the State Bar's mandatory fee dispute process, and did not timely respond to the State Bar.

Reprimands

The Grievance Committee reprimanded **William E. Brown** of Fayetteville because he did not respond to the committee.

Luther A. Douglas III of Laurinburg was reprimanded by the Grievance Committee. The clerk of court held him in contempt for willful failure to perform his duties as administrator of three estates.

The Grievance Committee reprimanded **John F. Hanzel** of Cornelius. Hanzel engaged in a conflict of interest by representing two clients with opposing interests and failing to withdraw immediately when he became aware of the conflict.

Barry Kempson of Asheville was reprimanded by the DHC. Kempson did not supervise his staff, resulting in an employee stealing entrusted funds from a client for whom Kempson served as attorney-in-fact.

William W. Noel III of Henderson was reprimanded by the Grievance Committee. Noel repeatedly undertook to represent clients and failed to provide the promised legal services. The Grievance Committee noted that it did not refer Noel to the DHC for trial because Noel was already serving an active suspension of his law license.

James P. Sledge of Durham was reprimanded by the Grievance Committee. Sledge prepared a will for his client leaving a substantial bequest to himself, included in the will a method for calculating his executor's commission that was contrary to the best interest of the estate, and did not advise his client to seek independent legal advice before signing the will.

Clarke K. Wittstruck of Asheville was reprimanded by the Grievance Committee. Wittstruck neglected and did not adequately communicate with his client and did not participate in the State Bar's mandatory fee dispute resolution process.

Transfers to Disability Inactive Status

The New Hanover Superior Court transferred **Sam Drewes Ryan** of Carolina Beach to disability inactive status.

Reinstatements

In September 2009 the DHC suspended **Tolly Albert Kennon** of Charlotte for three years. Kennon improperly advised unrepresented persons who were potential witnesses against his clients in two criminal cases and whose interests were potentially in conflict with those of his clients. His advice, if followed, had the potential to obstruct the government's access to these witnesses. He complied with all requirements for reinstatement and was reinstated by the secretary on August 12.

Correction

The Fall 2013 *Journal* included a summary that disbarred lawyer **Matthew Nestor** knowingly facilitated fraudulent real estate transactions. The specific conduct admitted by Mr. Nestor in his affidavit of surrender is that he knowingly prepared HUD-1 Settlement Statements that did not accurately show the disbursements in certain real estate transactions at the direction of a third party and thus enabled others to use his services to facilitate fraud. This is published to correct any inconsistency between the summary and Mr. Nestor's admission.

Notices of Intent to Seek Reinstatement

Individuals who wish to note their concurrence with or opposition to these petitions should file written notice with the secretary of the State Bar, PO Box 25908, Raleigh, NC 27611, before February 1, 2014 (60 days from publication).

In the Matter of Ralph Bryant Jr.

Notice is hereby given that Ralph Bryant Jr. intends to file a petition for reinstatement before the Disciplinary Hearing Commission of the North Carolina State Bar. Bryant surrendered his license in November 2007 as a result of allegations of misappropriation of client funds held in an IOLTA account. ■

Trust Accounting (cont.)

attempt, the lawyer cannot locate or determine the owner of the funds, the funds must be deemed abandoned and paid to the state treasurer in compliance with the requirements of G.S. 116B.

Escheating Property

Funds are to be deemed abandoned if, over the past five years, the fund's principal has not increased, the owner has not accepted payment of principal or income, the owner has not corresponded in writing, and the owner has not otherwise indicated an interest in the account. If any of the events listed above have occurred during the five-year period, a new five-year period begins to run during which the lawyer is obligated to maintain the property in the trust account. Lawyers should perform an annual review of their trust account to determine if any funds qualify for escheatment. For details on the escheat process, including forms and a Four-Step Reporting guide, visit nctreasurer.com/Claim-Your-Cash/For-Holders-Of-Unclaimed-Property/Pages/default.aspx or email the Unclaimed Property Division at unclaimed.property@nctreasurer.com. ■

Endnotes

1. Yes, we are trying to convince Anne to change her name to Bruno, rather unsuccessfully.
2. To avoid commingling, lawyers should remove earned fees from their trust accounts on a consistent cycle. Whether bi-weekly or monthly, a consistent billing cycle is good evidence that the lawyer is complying with the rules against commingling.

NOTE: Judicial Districts randomly selected for audit for the fourth quarter of 2013 are District 12 (Cumberland County) and District 19D (Moore County). Get fraud alerts and trust account information on Twitter. Follow @TrustAccountNC.

Membership Has Its Advantages

By Kelly Farrow

Should you join a voluntary paralegal organization? The benefits to becoming a member of a paralegal organization are endless, but here are a few of the significant ones.

Networking

Meeting other paralegals has many advantages. Other paralegals understand the unique challenges of working for lawyers, and networking provides ample opportunities for discussing these challenges and learning tips to cope with the stresses of the profession.

Suppose you have worked in civil litigation for several years, but you feel like you might want to try something new. Paralegal organizations have members who work in all different fields of law—what a great way to test-drive a new area! Find out what types of tasks these paralegals handle on a daily basis, what they enjoy about it, and what they don't enjoy. After talking to people who work in different fields, you may find a new one that is a perfect fit for you.

Now suppose that you've been working in a particular field of law for a year. You absolutely love it, and can't think of any reason to look at other fields. Networking with other paralegals that work in the same field of law can still have great benefits. Their firms may have different ways to prepare paperwork or keep track of deadlines, or maybe a paralegal has exposure to tasks in the field that you haven't had before. You can get great tips and learn new tricks from others in your field, making you even more valuable to your employer.

Another benefit of networking within a paralegal organization is potential job opportunities. While employers may not send recruiters to an organization's monthly meetings, paralegals that know of positions available at their firms or companies are more likely to recommend someone for the job if they know them through a professional organization or other professional capacity. The more people you meet, the more opportunities will present themselves. You can make new friends and find professional colleagues who will be with you for the duration of your professional life.

CPE

Many paralegal organizations sponsor continuing paralegal education (CPE) courses at their monthly or annual meetings, which are usually offered for free or at a substantially reduced rate for members. This is an excellent way to obtain CPE hours for a great price, and do some networking at the same time.

Pride in the Profession

You could stand on the street corner and scream, "I'm a paralegal and proud of it!" However, becoming a member of a paralegal organization is a more subtle way to show your pride in the profession. Your membership shows your supervising attorney, the legal staff in your office, and other paralegals that you are serious about being a paralegal, and darn proud of it, too.

Make a Difference

Did you know that the NC State Bar's paralegal certification program was actually born from the minds of paralegals like you? Paralegal organizations and their members wanted established, recognized standards for the paralegal profession in North Carolina, and thus began the long road to certification. There's no better way to implement change than to have an organization of like-minded paralegals behind you.

Awards/Accolades

A pat on the back is always nice, but sometimes you want more. Some organizations have awards to recognize stand-out paralegals. Being formally acknowledged by your peers for your excellence as a paralegal can be a great motivator.

Help New Paralegals

As an experienced paralegal, one of the best things you can do is pass along your knowledge and skills to those new to the profession. Some paralegal organizations pair new paralegals or paralegal students with member-mentors to help them learn the profession or answer questions about the field. This is a great way to give back to the paralegal community and strengthen the profession.

Choosing an Organization

There are quite a few paralegal organizations out there, so how do you pick the one (or ones) that are right for you? There are national organizations that bring together paralegals from all over the country. There are also statewide organizations as well as regional organizations, which are a great way to connect with other paralegals in your local area. Do some research to find out what organizations will benefit you the most. Check out their websites (you can find several on the Links page of our website, nccertifiedparalegal.gov), contact current members and officers, or better yet, go to a meeting. Understand an organization's mission and philosophy, dive into its culture, and find out which organization would be the most beneficial to you and your career.

Reaping the Rewards

You've done your research and joined a paralegal organization that is perfect for you—now what? Clearly, being a member has its advantages. But there are ways that you can get even greater benefits from your membership. Be more than just a member, be an active member. Go to regular meetings and make your voice heard. Volunteer to help with a specific project, like planning the annual meeting or other member event. Commit to teaching a CPE course during one of the monthly meetings. Work on a committee, or offer to chair a committee. Even nominate yourself for an officer position. You will find that you definitely get out of it what you put into it. ■

Kelly Farrow is the assistant director of the Paralegal Certification Program.

Amendments Approved by the Supreme Court

At a conference on August 27, 2013, the North Carolina Supreme Court approved the following amendments to the rules of the North Carolina State Bar:

Amendments to the Rules on Election of Councilors

27 N.C.A.C. 1A, Section .0800, Election and Appointment of State Bar Councilors

The amendments permit judicial district bars to adopt procedures for early voting in district bar elections for State Bar Councilor as long as there is appropriate notice and reasonable access to early voting locations for all active members in the judicial district.

Amendments to the Rules on Reinstatement from Administrative Suspension

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

The amendments extend to one year the time period during which an administratively suspended member may be reinstated by order of the secretary of the State Bar.

Amendments to the Standards for Certification of Specialists

27 N.C.A.C. 1D, Section .1700, The Plan of Legal Specialization

The amendments require an applicant for initial and continued certification as a specialist to have a satisfactory disciplinary history.

Amendments to The Plan for Certification of Paralegals

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals, and Section .0200, Rules Governing Continuing Paralegal Education

The amendments provide a procedure whereby an individual whose certification has lapsed for failure to complete the requirements for renewal within the prescribed time limit may request reinstatement by the Board of Paralegal Certification. The amendments to the rules on continuing paralegal education (CPE) require a CPE sponsor to apply for CPE accreditation for a program if more than five paralegals apply for individual accreditation of the program.

Amendments Pending Approval of the Supreme Court

At its meeting on October 25, 2013, the council of the North Carolina State Bar voted to adopt the following rule amendments for transmission to the North Carolina Supreme Court for approval (for the complete text see the Fall 2013 edition of the *Journal* or visit the State Bar website):

Proposed Amendments to the Rules on Classes of Membership

27 N.C.A.C. 1A, Section .0200, Membership - Annual Membership Fees

The proposed amendments allow an inactive member of the State Bar to be designated as "retired" in the State Bar membership records and to hold himself or herself out as a "Retired Member of the State Bar."

Proposed Amendments to the Rules for Judicial District Bars

27 N.C.A.C. 1A, Section .0900, Organization of the Judicial District Bars

The proposed amendments exempt members who are on active military duty or newly admitted to the bar from the obligation to pay a judicial district bar annual membership fee. The proposed amendments also require judicial district bars that assess mandatory membership fees for the first time after 2013 to adopt a fiscal year of July 1- June 30.

Proposed Amendments to the Rules and Regulations Governing the CLE Program

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Education Program, and Section .1600, Regulations Governing the Administration of the Continuing Education Program

The proposed amendments make the following changes to the rules and regulations for the CLE program: change the name of the professionalism requirement for new lawyers from "New Admitee Professionalism Program" to "Professionalism for New Attorneys Program" (PNA Program); specify that the PNA Program may be presented by live webcast or by video replay if one hour of every six hours of programming is live; revise the accredited sponsor rule to reflect accurately the process that is used to approve programs presented by accredited sponsors; permit the accreditation of a product-specific technology course if there is a nexus to the practice of law and certain other conditions are met; increase the number of CLE credits that may be taken online each year from 4 to 6 credits; correct a typographical error that implies that more than 6 hours of computer-based CLE may be carried over to the next year; and clarify that webcasting is a live simultaneous broadcast that is not subject to the restrictions on video replay presentations.

When the proposed amendments were published in the Fall 2013 edition of the *Journal*, the new name proposed for the professionalism program, as set forth in proposed amendments to Rule .1518, was "Professionalism for New Admittees." At its meeting on October 25, 2013, the Council determined that "Professionalism for New Attorneys" was a more suitable name. Because this change is not substantive, the proposed amendments to Rule .1518 are not republished for comment.

Proposed Amendments to the Rules for the Paralegal Certification Program

27 N.C.A.C. 1G, Section .0100, The

Plan for Certification of Paralegals, and Section .0200, Rules Governing Continuing Paralegal Education

The proposed amendments to the Plan for Certification of Paralegals clarify the current duties of the Paralegal Certification Committee. The proposed amendments to the rules on continuing paralegal education (CPE) allow stress management courses to be approved for CPE.

Proposed Amendments to Rules of Professional Conduct

27 N.C.A.C. 2, Rules of Professional Conduct

Amendments to Rule 1.17, *Sale of a Law Practice*, and Rule 7.3, *Direct Contact with Potential Clients*, are proposed. The proposed amendments to Rule 1.17 clarify that a sole practitioner who sells his or her law practice to another lawyer may continue to work for the firm. The proposed amendments also explain the disclosure requirements if the purchaser continues to use the name of the firm. The proposed amendments to Rule 7.3 specify that the advertising notice on written targeted communications soliciting professional employment must be conspicuous and must match in size, color, and type the largest and widest of the fonts used on the envelope or written communication.

Proposed Amendments

At its meeting on October 25, 2013, the council voted to publish the following proposed rule amendments for comment from the members of the bar:

Proposed Amendments to the Model Bylaws for Judicial District Bars

27 N.C.A.C. 1A, Section .1000, Model Bylaws for Use by Judicial District Bars

The proposed amendments reflect recent changes to NC Gen. Stat. §7A-142, which allows members of a judicial district bar to participate in the selection of nominees to be considered by the governor when filling a vacant district court judgeship in the district. The proposed amendments also prohibit voting by proxy when selecting nominees.

Rule .1013 Selection of Nominees for District Court Judge

Unless otherwise required by law, the following procedures shall be used to determine the nominees to be recommended to the governor pursuant to NC Gen. Stat. §7A-142 for vacant district court judgeships in the judicial district.

(a) Meeting for Nominations:

....

(b) Candidates:

...

(c) Voting: Each district bar member **eligible to vote pursuant to NC Gen. Stat. § 7A-142** may vote for **up to ~~three~~ five** candidates. Cumulative voting is prohibited. **Proxy voting is prohibited.**

(d) Submission to Governor: The **~~three~~ five** candidates receiving the highest number of votes shall be the nominees to fill the vacancy on the district court and their names, and vote totals, shall be transmitted to the governor. In the event of a tie for **~~third~~ fifth** place, the names of those candidates involved in the tie shall be transmitted to the governor together with the names of the **~~two~~ four** candidates receiving the highest number of votes.

Proposed Amendments to the Procedures for Reinstatement from Inactive Status and Administrative Suspension

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

The proposed amendments eliminate the three different CLE requirements for reinstatement from inactive status and administrative suspension (the application of which depends upon when the member's status changed) in favor of one standard that will apply to all petitioners for reinstatement without regard to when the petitioner was transferred to inactive or suspended status. In addition, by making March 10, 2011, the effective date for the requirement of passage of the bar exam if the petitioner was administratively suspended for seven years or more, the proposed amendments bring the requirements for reinstatement from administrative suspension further into conformity with the requirements for reinstatement from inactive status.

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement

...

(c) Requirements for Reinstatement

(1) Completion of Petition.

...

(2) CLE Requirement**~~s~~** for Calendar Year Before Inactive.

Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (c)(5) of this rule, the member must satisfy the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the calendar year in which the member was transferred to inactive status (the "subject year"), including any deficit from a prior calendar year that was carried forward and recorded in the member's CLE record for the subject year.

(3) Character and Fitness to Practice.

...

~~(4) CLE Requirements For Members Granted Inactive Status Prior to March 10, 2011.~~

~~[Effective for all members who are transferred to inactive status on or after January 1, 1996, through March 9, 2011.] If more than 2 years have elapsed between the date of the entry of the order transferring the member to inactive status and the date the petition is filed, the member must complete 15 hours of continuing legal education (CLE) approved by the Board of Continuing Legal Education pursuant to Rule .1519 of this subchapter. Of the required 15 CLE hours, 3 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism. The CLE hours must be completed within one year prior to the filing of the petition.~~

(4)**~~(5)~~ Additional** CLE Requirement**~~s~~ ~~If Inactive Less Than 7 Years~~**.

~~[Effective for all members who are transferred to inactive status on or after March 10, 2011.]~~ If more than 1 ~~but less than 7 years have~~ **year has** elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must complete 12 hours of approved CLE for each year that the member was inactive **up to a maximum of 7 years**. The CLE hours must be completed within 2 years prior to filing the petition. For each 12-hour increment, 4 hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee. If during the period of inactivity the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(5)~~(6)~~ Bar Exam Requirement if Inactive 7 or More Years.

[Effective for all members who are transferred to inactive status on or after March 10, 2011.] If 7 years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination. **A member subject to this requirement does not have to satisfy the CLE requirements in paragraphs (c)(2) and (c)(4).**

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of inactive status shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)~~(5)~~**(4)** for each year that the member was inactive up to a maximum of 7 years.

(B) Military Service. Each calendar year in which an inactive member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)~~(5)~~**(4)** for each year that the member was inactive up to a maximum of 7 years.

...

.0904 Reinstatement from Suspension

(a) Compliance Within 30 Days of Service of Suspension Order.

...

(d) Requirements for Reinstatement

(1) Completion of Petition

...

(2) CLE Requirements for Calendar Years Before Suspended

Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (d)(4) of this rule, the member must satisfy the minimum continuing legal education (CLE) requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was suspended (the "subject year"), including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year. The member shall also sign and file any delinquent CLE annual report form.

(3) **Additional** CLE Requirement ~~If Suspended Less Than 7 Years~~

If more than 1 ~~but less than 7 years have~~ **year has** elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, the member must complete 12 hours of approved CLE for each year that the member was suspended **up to a maximum of 7 years**. The CLE must be completed within 2 years prior to filing the petition. For each 12-hour increment, 4 hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee. If during the period of suspension the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(4) Bar Exam Requirement if Suspended 7 or More Years

[Effective for all members who are administratively suspended on or after March 10, 2011.] If 7 years or more have elapsed between the effective date of the suspension order and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination. **A member subject to this requirement does not have to satisfy the CLE requirements in paragraphs (d)(2) and (d)(3).**

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

(B) Military Service. Each calendar year in which a suspended member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

(4) Character and Fitness to Practice

...

Proposed Amendments to The Plan of Legal Specialization

27 NCAC 1D, Section .1700, The Plan

of Legal Specialization; Section .1800, Hearing and Appeal Rules of the Board of Legal Specialization

The proposed amendments add trademark law to the official list of recognized specialties and allow denial of a re-grading petition by the chair of the Board of Legal Specialization upon a finding that insufficient points are at issue to justify re-grading the examination.

.1725 Areas of Specialty

There are hereby recognized the following specialties:

(1) bankruptcy law

(a) consumer bankruptcy law

(b) business bankruptcy law

(2) ...

(11) trademark law.

.1803 Reconsideration of Failed Examination

(a) Review of Examination.

...

(c) Denial of Petition by Chair. The director of the specialization program shall review the petition and determine whether, if all grading objections of the petitioner are decided in the petitioner's favor, the petitioner's grade on the examination would be changed to a passing grade. If the director determines that the petitioner's grade would not be changed to passing, the director shall notify the chair who may deny the petition on this basis.

~~(c)~~(d) Review Procedure.

[Re-lettering remaining paragraphs.]

Proposed Amendments to The Plan for Certification of Paralegals

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

The proposed amendments allow certified paralegal members of the board to be reappointed by the council at the end of their terms without nomination by vote of all active certified paralegals; provide additional standards for certification relative to misconduct based on dishonesty, fraud, deceit, or misrepresentation; and expand the standards for qualified paralegal studies programs to include those that are institutional members of national accrediting agencies recognized by the United States Department of Education.

.0105 Appointment of Members; When; Removal

(a) Appointment. The council shall appoint the members of the board, provided, however, after the appointment of the initial members of the board, each paralegal member appointed for an initial term shall be selected by the council from two nominees determined by a vote by mail or online of all active certified paralegals in an election conducted by the board.

(b) …

.0108 Succession

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Each certified paralegal member shall be eligible for reappointment by the council at the end of his or her term without appointment of a nominating committee or vote of all active paralegals as would be otherwise required by Rule .0105 of this subchapter. Thereafter, no person may be reappointed without having been off of the board for at least three years.

.0119 Standards for Certification of Paralegals

(a) …

(b) Notwithstanding an applicant's satisfaction of the standards set forth in Rule .0119(a) or (b), no individual may be certified as a paralegal if:

(1) the individual's certification or license as a paralegal in any state is under suspension or revocation;

(2) the individual's license to practice law in any state is under suspension or revocation;

(3) the individual has been convicted of a criminal act that reflects adversely on the individual's honesty, trustworthiness, or fitness as a paralegal, or has engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, provided, however, the board may certify an applicant if, after consideration of mitigating factors, including remorse, reformation of character, and the passage of time, the board determines that the individual is honest, trustworthy, and fit to be a certified paralegal; or

(4) the individual is not a legal resident of the United States.

(e) Qualified Paralegal Studies Program. A qualified paralegal studies program is a program of paralegal or legal assistant studies that is an institutional member of the Southern Association of Colleges and Schools or other regional or national accrediting agency recognized by the United States Department of Education, and is either

(1) approved by the American Bar Association;

(2) an institutional member of the American Association for Paralegal Education; or

(3) offers at least the equivalent of 18 semester credits of coursework in paralegal studies as prescribed by the American Bar Association Guidelines for the Approval of Paralegal Education. ■

Legal Specialization (cont.)

me market my skills and develop my practice. It also continues to give me an incentive to stay up to date with current developments in my practice area.

Q: Does certification benefit the profession or the public?

To the extent that it creates more knowledgeable and skilled lawyers, it helps both the profession and the public. Additionally, it can help lawyers distinguish themselves and encourage them to develop a deeper knowledge base in their practice area.

Q: Would you encourage other lawyers to pursue certification?

I do encourage lawyers that I know to pursue certification. First and foremost because it requires them to really dedicate themselves to learning the substantive law and procedures for their practice area. Second, it can help them market themselves and subsequently assist clients to find them. It's not necessarily an easy process, but if you've been practicing at least five to six years and you spend a week studying, it is certainly doable. ■

For more information on the State Bar's specialization programs, please visit us online at nclawspecialists.gov.

In the Digital Age, Which Records Make Up a Client's File?

Council Actions

At its meeting on October 25, 2013, the State Bar Council adopted the ethics opinions summarized below:

2012 Formal Ethics Opinion 7

Copying Represented Persons on Electronic Communications

Opinion provides that consent from opposing counsel must be obtained before copying opposing counsel's clients on electronic communications. The consent required by Rule 4.2 may be implied by the facts and circumstances surrounding the communication.

2013 Formal Ethics Opinion 1

Release/Dismissal Agreement Offered by Prosecutor to Convicted Person

Opinion rules that, subject to conditions, a prosecutor may enter into an agreement to consent to vacating a conviction upon the convicted person's release of civil claims against the prosecutor, law enforcement authorities, or other public officials or entities.

2013 Formal Ethics Opinion 9

Role of Lawyer for Public Interest Law Organization

Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

2013 Formal Ethics Opinion 10

Participation in Online Group Legal Advertising Using Territorial Exclusivity

Opinion rules that, with certain disclosures, a lawyer may participate in an online group legal advertising service that gives a participating lawyer exclusive rights to contacts arising from a particular territory.

Ethics Committee Actions

At its meeting on October 24, 2013, the Ethics Committee voted to withdraw Proposed 2011 FEO 11, *Communication with Represented Party by Lawyer Who is the Opposing Party*. No opinion will be issued in response to the inquiries addressed in the proposed opinion. The committee also voted to send Proposed 2013 FEO 8, *Responding to the Mental Impairment of Firm Lawyer*, to the staff for revisions to be considered by the committee at its meeting in January 2014. Consideration of Proposed 2013 FEO 11, *Duty to Obtain Foreign Language Interpreters for Client with Limited English Proficiency*, was deferred until resolution of an underlying legal issue. The Ethics Committee also voted to publish a revised proposed opinion (Proposed 2013 FEO 2) and four new proposed opinions. The comments of readers are welcomed.

Proposed 2013 Formal Ethics Opinion 2
Providing Defendant with Discovery During Representation
October 24, 2013

Proposed opinion rules that if, after providing a criminal client with a summary/explanation of the discovery materials in the client's file, the client requests access to the entire file, the lawyer must afford the client the opportunity to meaningfully review all of the relevant discovery materials unless the lawyer believes it is in the best interest of the client's legal defense not to do so.

Inquiry #1:

Lawyer represents Defendant in a criminal case. The state has provided Lawyer with discovery as PDF files. The state has also provided Lawyer DVDs containing copies of the video recordings of interrogations of Defendant and a codefendant; surveillance videotapes; and audio recordings of calls made by Defendant and the codefendant from the jail.

Lawyer reviewed the discovery and provided Defendant with a summary of the evidence. Defendant demands that he be provided a copy of the entire 1,200 pages of discovery and be allowed to view/listen to the 17 hours of video and audio recordings.

Does Lawyer have an ethical duty to comply with the client's demand?

Opinion #1:

As a matter of professional responsibility, Rule 1.4 requires a lawyer to "keep a client reasonably informed about the status of a matter" and "promptly comply with reasonable requests for information." As stated in comment [5] to Rule 1.4:

> The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued...The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

The duties set out in Rule 1.4 are similar to those found in ABA Standards for Criminal Justice, Defense Functions, Standard 4-3.8 (3d ed. 1993) which provides:

> (a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.
> (b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

During the course of the representation, the lawyer complies with the requirements of Rule 1.4 by providing the client with a summary of the discovery materials and consulting with the client as to the relevance of the materials to the client's case. However, if the lawyer has provided the client with a summary/explanation of the discovery materials and

the client, nonetheless, requests copies of any of the file materials, the lawyer must afford the client the opportunity to meaningfully review all of the relevant discovery material unless the lawyer believes it is in the best interest of the client's legal defense to deny the request. The lawyer is not required to provide the client with a physical copy of the discovery materials during the course of the representation.

In determining what discovery materials are relevant, and what disclosure is in the best interest of the client's legal defense, the lawyer must exercise his or her independent professional judgment. As stated in comment [5] to Rule 1.4: "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." However, as stated in comment [7] to Rule 1.4, a lawyer "may not withhold information to serve the lawyer's own interest or convenience or the interest or convenience of another person." Therefore, the lawyer may not deny the request due to issues of expense or inconvenience.

Inquiry #2:

If Lawyer provides Defendant with a copy of, or access to, discovery materials, may Lawyer redact or otherwise remove private information of a third person, such as the address of a witness or pictures of an alleged rape victim?

Opinion #2:

The lawyer may redact or otherwise remove information that the lawyer determines, in his professional discretion, should not be disclosed to the client, including information that would endanger the safety and welfare of the client or others, violate a court rule or order, or is subject to any protective order or nondisclosure agreement. *See* Rule 1.4, cmt. [7].

Proposed 2013 Formal Ethics Opinion 12
Disclosure of Settlement Terms to Former Lawyer Asserting a Claim for Fee Division
October 24, 2013

Proposed opinion rules that, when a client terminates representation, the subsequently hired lawyer may disclose the settlement terms to the former lawyer to resolve a pre-litigation claim for fee division only with the consent of the client or pursuant to an applicable exception to the duty of confidentiality.

Facts:

Client hired Lawyer A to represent Client in a workers' compensation matter. A year later, Client discharged Lawyer A and subsequently hired Lawyer B. Lawyer A filed a motion to withdraw as counsel while reserving her right to a legal fee. Lawyer B settled Client's workers' compensation case and the Industrial Commission entered an order approving the settlement and the legal fee to be paid from the proceeds of the settlement. Lawyer A asked Lawyer B for a copy of the Industrial Commission's order. Client instructed Lawyer B to keep the settlement information confidential. Lawyer B therefore refused to provide Lawyer A with a copy of the Industrial Commission's order and also refused to disclose the settlement amount. However, Lawyer B asked Lawyer A to submit an accounting of Lawyer A's hours in the case and Lawyer A's hourly rate. Lawyer A refused to provide an accounting of her time without more information about the settlement. Lawyer A insists that she needs to know the settlement amount to determine the amount of the fee that is to be divided between the two lawyers. Lawyer A further asserts that before she can determine the amount of her fee, she must know which injury claims are subject to the settlement.

Inquiry:

May Lawyer B share the settlement details with Lawyer A?

Opinion:

No. 2003 FEO 11, which examines ethical issues relative to the division of fees between a law firm and a lawyer who has departed from the firm, *does not* apply to this inquiry. In 2003 FEO 11, a lawyer took an unfinished workers' compensation case with her when she left one firm to join another. The workers' compensation case was resolved after the lawyer's departure and the Industrial Commission entered an order releasing the lawyer's former firm from further representation and acknowledging the firm's entitlement to a portion of the legal fee. In holding that the departed lawyer must inform her former firm of the amount of the legal fee awarded by the commission, the opinion addresses the duty of lawyers who have practiced together, and who have interrelated claims to a legal fee, to deal honestly with each other and to comply with court orders.

In the current inquiry, Lawyer B was hired by Client after the termination of Lawyer A's services. Lawyers A and B were never members of the same firm. The lawyers' claims to the legal fee arise from their separate representations of Client. Although they have a duty to deal honestly with each other, this duty does not permit Lawyer B to disclose information that Client has requested be held in confidence. Keeping a client's information confidential is paramount among the duties a lawyer owes to the client. Unless Client consents to the disclosure or one of the exceptions set out in Rule 1.6(b) applies, Lawyer B may not reveal the details of the settlement to Lawyer A.

A client has the right to discharge his lawyer at any time. Where a lawyer with a contingency fee contract is terminated before the matter is concluded, the discharged lawyer has a claim for *quantum meruit* recovery from the proceeds of the matter. *Covington v. Rhodes*, 38 NC App. 61, 247 S.E.2d 305 (1978), *disc. rev. denied*, 296 NC 410, 251 S.E.2d 468 (1979). The discharged lawyer may file his claim for *quantum meruit* against the client or against the subsequent lawyer. *Guess v. Parrott*, 160 NC App. 325, 585 S.E.2d 464 (2003).

Rule 1.6(b)(6) permits a lawyer to disclose confidential client information, without the client's consent, "to respond to allegations in any proceeding concerning the lawyer's representation of the client." If Lawyer A brings an action against Lawyer B claiming a part of the legal fee, Lawyer B may reveal the details of the settlement to the extent necessary to respond to the allegations in the complaint. However, until the action is filed, Lawyer B may not disclose the information without Client's consent.

Rather than wait for Lawyer A to file suit, however, the better practice is to attempt to resolve a dispute before litigation. To this end, at the beginning of the representation, Lawyer B may obtain Client's consent to disclose the terms of the settlement to Lawyer A. To assist Client to make an informed decision about whether to disclose information to Lawyer A, Lawyer B should counsel Client about the law pertaining to Lawyer A's claim for a legal fee based on *quantum*

meruit. Lawyer B also should explain to Client the risks and benefits of disclosure. *See* Rule 1.4(a) and (b). If Client consents to the disclosure, Lawyer B may want to memorialize that consent by including it a written representation agreement with Client. Even if Client consents to disclosure, only that information relevant to the valuation of Lawyer A's legal services may be disclosed.

Proposed 2013 Formal Ethics Opinion 13
Disbursement Against Funds Credited to Trust Account by ACH and EFT
October 24, 2013

Proposed opinion rules that a lawyer may disburse immediately against funds that are credited to the lawyer's trust account by automated clearinghouse (ACH) transfer and electronic funds transfer (EFT) despite the risk that an originator may initiate a reversal.

Inquiry:

The originator of an automated clearinghouse (ACH) transfer[1] or an electronic funds transfer (EFT) can initiate a reversal of the transaction. However, the reversal must be requested by the originating bank and approved by the receiving bank. When a bank receives a reversal request, it typically will attempt to obtain authorization from the individual whose account was credited before making a reversal.

May a lawyer disburse immediately against funds that are credited to her trust account by ACH or EFT if there is some risk that the originator may initiate a reversal?

Opinion:

Yes. Electronic funds transfers, whether ACH or EFT, are designed to make funds available immediately, like wired funds. While there is some risk that the originator may initiate a reversal, the risk of reversal is slight. Moreover, the lawyer should get notice from the receiving bank in time to take action to prevent the reversal or otherwise to protect other client funds on deposit in the trust account. *See, e.g.*, 97 FEO 9 (lawyer may accept payments to a trust account by credit card although the bank is authorized to debit the trust account in the event a credit card charge is disputed).

A lawyer is not guilty of professional misconduct if that lawyer, upon learning that an ACH or EFT has been reversed, immediately acts to protect the funds of the lawyer's other clients on deposit in the trust account. This may be done by personally depositing the funds necessary to address the deficit created by the reversal or by securing or arranging payment from sources available to the lawyer other than trust account funds of other clients. *See* RPC 191.

Endnote

1. When a paper check is converted to an automated clearinghouse (ACH) debit, the check is taken either at the point-of-sale or through the mail for payment, the account information is captured from the check, and an electronic transaction is created for payment through the ACH system. The original physical check is typically destroyed by the converting entity (although an image of the check may be stored for a certain period of time). A law firm may convert the paper checks that it receives on behalf of a client or a client matter for payment to the trust account through the ACH system.

   Authorized ACH debits from the trust account that are electronic transfers of funds (in which no checks are involved) are allowed provided the lawyer maintains a record of the transaction as required by Rule 1.15-3(b)(3) and (c)(3). The record, whether consisting of the instructions or authorization to debit the account, a record or receipt from the register of deeds or a financial institution, or the lawyer's independent record of the transaction, must show the amount, date, and recipient of the transfer or disbursement, and, in the case of a general trust account, also show the name of the client or other person to whom the funds belong.

   Nevertheless, checks *drawn* on a trust account should not be converted to ACH because the lawyer will not receive a physical check or a check image that can be retained in satisfaction of the record-keeping requirements in Rule 1.15-3. The transaction will appear on the lawyer's trust account statement as an ACH debit with limited information about the payment (e.g., dollar amount, date processed, originator of the ACH debit). For this reason, lawyers are required to use business-size checks that contain an Auxiliary-On-Us field in the MICR line of the check because these checks cannot be converted to ACH. *See* Rule 1.15-3(a).

   See generally Rule 1.15, comments [17] and [18] .

Proposed 2013 Formal Ethics Opinion 14
Representation of Parties to a Commercial Real Estate Loan Closing
October 24, 2013

Proposed opinion rules that common representation in a real estate commercial loan closing is, in most instances, a "nonconsentable" conflict, meaning that a lawyer may not ask the borrower and the lender to consent to common representation.

Background:

In the standard closing of a commercial loan secured by real property (a "commercial loan closing"), the borrower and the lender have separate legal counsel. The borrower's lawyer traditionally handles most aspects of the closing including the preparation of the settlement statement as well as the collection of funds, the payoffs, and the disbursements. The borrower understands that its lawyer represents its interests alone. Unlike a residential real estate closing in which the lender's documents can rarely be modified once entered into by the borrower/buyer, it is common in a commercial loan closing for the borrower's lawyer to be actively involved in negotiating provisions of the commitment letter that establishes the basic terms of the mortgage and to also negotiate specific revisions to the loan documents to address material matters such as default, disbursement of

Public Information

The Ethics Committee's meetings are public, and materials submitted for consideration are generally NOT held in confidence. Persons submitting requests for advice are cautioned that inquiries should not disclose client confidences or sensitive information that is not necessary to the resolution of the ethical questions presented.

Citation

To foster consistency in citation to the North Carolina Rules of Professional Conduct and the formal ethics opinions adopted by the North Carolina State Bar Council, the following formats are recommended:

· To cite a North Carolina Rule of Professional Conduct: NC Rules of Prof'l Conduct Rule 1.1 (2003)

· To cite a North Carolina formal ethics opinion: NC State Bar Formal Op. 1 (2011)

Note that the current, informal method of citation used within the formal ethics opinions themselves and in this *Journal* article will continue for a transitional period.

Rules, Procedure, Comments

All opinions of the Ethics Committee are predicated upon the Rules of Professional Conduct as revised effective March 1, 2003, and thereafter amended, and referred to herein as the Rules of Professional Conduct (2003). The proposed opinions are issued pursuant to the "Procedures for Ruling on Questions of Legal Ethics." 27 N.C.A.C. ID, Sect .0100. Any interested person or group may submit a written comment or request to be heard concerning a proposed opinion. Any comment or request should be directed to the Ethics Committee at PO Box 25908, Raleigh, NC 27611, by December 31, 2013.

Captions and Headnotes

A caption and a short description of each of the proposed opinions precedes the statement of the inquiry. The captions and descriptions are provided as research aids and are not official statements of the Ethics Committee or the council.

insurance proceeds, permitted transfers, and indemnification.

A large regional bank recently changed its commercial loan closing policies to require all lawyers who close commercial loans with the bank to be employed by law firms that are "authorized" by the bank to close its loans. These lawyers are designated as "Bank's Counsel." Bank's Counsel is asked by the bank to handle the entire closing including the title search, title certification, and the holding and disbursing of the closing funds.

Lawyers who traditionally represent the borrower in a commercial loan closing are concerned about this policy for a number of reasons including the following:

• Having closing funds delivered to the lender's lawyer instead of the borrower's lawyer subjects the borrower to responsibility for the funds without the benefit of its own legal counsel's guidance, protection, and assistance.

• Once the loan funds are committed to the borrower by the lender, they become the responsibility of the borrower. When there is separate, independent representation of the borrower, the protections of malpractice insurance and the closing protection letter are available to the borrower.

• The borrower's recourses may be limited if closing funds are mishandled and the borrower suffers a loss in connection with Bank's Counsel's preparation of the closing statement and disbursement of the loan proceeds. However, when the borrower's lawyer performs the escrow and closing functions, the lender gets an insured closing letter and a legal opinion relative to authority and enforceability from the borrower's lawyer and has protection.

• Having the lender's lawyer perform the property and business due diligence functions may result in the disclosure of confidential information relative to the borrower's property or its business interests that would not be disclosed if the borrower's lawyer performed these functions.

• Unless the borrower is sophisticated and instructs its lawyer to be actively involved, the borrower's lawyer may be placed in the role of "outsider" or passive observer, which may limit the quality and scope of the representation that the borrower receives. It will also invite, notwithstanding disclosure, the perception that the lender's lawyer is looking out for the interests of all of the parties.

Inquiry #1:

May a lawyer represent both the borrower and the lender for the closing of a commercial loan secured by real property? If so, is informed consent of both the borrower and the lender required and what information must be disclosed to obtain informed consent?

Opinion #1:

In most instances, a lawyer may not represent both the borrower and the lender for the closing of a commercial loan even with consent.

Rule 1.7 prohibits the representation of a client if the representation involves a concurrent conflict of interest unless certain conditions are met. A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client or the representation of one client may be materially limited by the lawyer's responsibilities to another client. Rule 1.7(a). The closing of a commercial loan secured by real estate is an "arm's length" business transaction in which large sums of money are at stake, the documentation is complex, and the opportunities to negotiate on behalf of each party are numerous. As observed in the comment to Rule 1.7:

> Even where there is no direct adverseness, a conflict of interest exists if a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client may be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent a seller of commercial real estate, a real estate developer, and a commercial lender is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself preclude the representation or require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Rule 1.7, cmt. [8].

Rule 1.7(b) allows a lawyer to proceed with a representation burdened with a concurrent conflict of interest, but only if the lawyer determines that the representation of all of the affected clients will be competent and diligent and each affected client gives informed consent. In other words, the lawyer must decide whether the conflict is "consentable." Rule 1.7, cmt. [2]. If the lawyer's exercise of independent professional judgment on behalf of any client will be compromised, the conflict is not consentable. As noted in the comment to Rule 1.7:

> [S]ome conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or pro-

> vide representation on the basis of the client's consent...Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest...[R]epresentation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

Rule 1.7, cmt.[14]-[15]. Although deleted from the comment to Rule 1.7 when the Rules of Professional Conduct were comprehensively revised in 2003, the following is an excellent test for determining whether a conflict is "consentable": "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Rule 1.7, cmt. [5] (2002).

In RPC 210, the Ethics Committee held that a lawyer may represent the seller, borrower/buyer, and lender in a residential real estate closing with the informed consent of all of the parties. Even so, the opinion includes the following cautionary language:

> A lawyer may reasonably believe that the common representation of multiple parties to a residential real estate closing will not be adverse to the interests of any one client if the parties have already agreed to the basic terms of the transaction and the lawyer's role is limited to rendering an opinion on title, memorializing the transaction, and disbursing the proceeds. Before reaching this conclusion, however, the lawyer must determine whether there is any obstacle to the loyal representation of both parties. The lawyer should proceed with the common representation only if the lawyer is able to reach the following conclusions: he or she will be able to act impartially; there is little likelihood that an actual conflict will arise out of the common representation; and, should a conflict arise, the potential prejudice to the parties will be minimal.

A commercial loan closing is substantially different from a residential closing in which there is little opportunity to negotiate on behalf of the borrower/buyer once the purchase contract and loan commitment letter are signed. In a commercial loan closing, there are numerous opportunities for a lawyer to negotiate on behalf of the parties, so impartiality is rarely possible. There are also numerous opportunities for an actual conflict to arise between the borrower and the lender and, if a conflict does arise, the prejudice to the parties would be substantial. Therefore, common representation in a commercial loan closing is, in most instances, a "nonconsentable" conflict, meaning that a lawyer may not ask the borrower and the lender to consent to common representation. *Restatement (Third) of The Law Governing Lawyers*, §122, Comment g(iv), cites decisions in which the court denied the possibility of client consent as a matter of law in certain categories of cases. These decisions include *Baldasarre v. Butler*, 625 A. 2d 458 (NJ 1993), in which the Supreme Court of New Jersey observed:

> This case graphically demonstrates the conflicts that arise when an attorney, even with both clients' consent, undertakes the representation of the buyer and the seller in a complex commercial real estate transaction. The disastrous consequences of [the lawyer's] dual representation convince us that a new bright-line rule prohibiting dual representation is necessary in commercial real estate transactions where large sums of money are at stake, where contracts contain complex contingencies, or where options are numerous. The potential for conflict in that type of complex real estate transaction is too great to permit even consensual dual representation of buyer and seller. Therefore, we hold that an attorney may not represent both the buyer and seller in a complex commercial real estate transaction even if both give their informed consent.

635 A. 2d at 467. *See also* Fla. Bar. Prof'l Ethics Comm., Op. 97-2 (1997)(lawyer may not represent both buyer and seller in closing of sale of business where material terms of contract have not been agreed to or discussed by parties).

In summary, dual representation of the borrower and the lender for the closing of a commercial loan is a nonconsentable conflict of interest unless the following conditions can be satisfied: (1) the financial stakes are not high; (2) the contractual terms have been finally negotiated prior to the commencement of the representation; (3) there are no contingencies to be resolved; (4) the lawyer explains to both parties that his role is limited to executing the tasks necessary to close the loan and that this limitation prohibits him from advocating for the specific interests of either party; (5) the lawyer discloses that he must withdraw from the representation of both parties if a conflict arises; and (6) both parties give informed consent confirmed in writing.

Inquiry #2:

The bank intends for Bank's Counsel to represent only the bank (lender), but to handle all aspects of the closing.

May a lawyer represent only the lender, but handle all aspects of a commercial loan closing including the title search, title certification, marshalling the necessary documents, and holding and disbursing of the closing funds? If so, what information must be disclosed by Bank's Counsel to the borrower relative to the role of Bank's Counsel?

Opinion #2:

Yes, a lawyer may be the lead lawyer for the closing ("the closing lawyer") provided the lawyer represents only one party—either the lender or the borrower. Because title work and other due diligence are for the benefit of the lender, there is no prohibition on the lender's lawyer performing these tasks. *See* 2004 FEO 10 (because buyer is the intended beneficiary of the deed although not a signatory, buyer's lawyer may prepare deed without creating a lawyer-client relationship with seller). However, if the closing lawyer represents the lender, certain conditions must be satisfied.

In 2006 FEO 3, the Ethics Committee considered whether a lawyer may represent a lender on the closing of the sale to a third party of property acquired by the lender as result of foreclosure by execution of the power of sale in the deed of trust on the property. The opinion holds (among other things) that a lawyer may serve as the closing lawyer and limit his representation to the lender/seller if there is disclosure to the buyer:

> Attorney A must fully disclose to Buyer that [the lender/seller] is his sole client, he does not represent the interests of Buyer, the closing documents will be prepared consistent with the specifications in the contract to purchase, and, in the absence of such specifications, he will prepare the documents in a manner that

will protect the interests of his client, [the lender/seller], and, therefore, Buyer may wish to obtain his own lawyer. *See, e.g.*, RPC 40 (disclosure must be far enough in advance of the closing that the buyer can procure his own counsel), RPC 210, 04 FEO 10, and Rule 4.3(a). Because of the strong potential for Buyer to be misled, the disclosure must be thorough and robust.

Consistent with the holding in 2006 FEO 3, in a commercial loan closing the lender's lawyer may serve as the closing lawyer provided the borrower is informed that the closing lawyer will not represent its interests and will interpret loan documents in the light that is most favorable to the lender; the borrower is given a reasonable opportunity to retain its own counsel and is not mislead as to its right to do so; the lawyers for both parties advise their clients about the risks and benefits of a having the lender's lawyer serve as the closing lawyer; and the borrower's lawyer is allowed to observe and participate in the transaction to the extent necessary to protect the borrower's interests.

This opinion cannot address all of the concerns expressed in the Background section above relative to the additional risks to the borrower if the lawyer for the closing is the lender's lawyer. However, if the closing funds are deposited to and disbursed from the trust account of the lender's lawyer in accordance with the requirements of the trust accounting rule, Rule 1.15, the funds should not be at risk. To the extent that there are other risks to the interests of the borrower, the borrower's lawyer must analyze those risks and advise the borrower about steps that may be taken to minimize the risks including negotiating with the lender's lawyer for aspects of the closing to be handled by the borrower's lawyer.

Proposed 2013 Formal Ethics Opinion 15
Return of Electronic Records to Client upon Termination of Representation
October 24, 2013

Proposed opinion rules that electronic records relative to a client's matter that would be helpful to subsequent legal counsel must be provided to the client upon the termination of the representation, but may be provided in an electronic format if readily accessible to the client without undue expense.

Inquiry #1:

In the age of electronic records, what information must be given to a departing client when the client requests the file?

Opinion #1:

Rule 1.16(d) of the Rules of Professional Conduct requires a lawyer, upon termination of representation, to "take steps to the extent reasonably practicable to protect a client's interests, such as...surrendering papers and property to which the client is entitled..."

Comment 10 to Rule 1.16 specifically provides that copies of "all correspondence received and generated by the withdrawing or discharged lawyer should be released; and anything in the file that would be helpful to successor counsel should be turned over."

Competent representation includes organized record-keeping practices that safeguard the documentation and information necessary to enable the lawyer to (1) readily retrieve information required for the representation; (2) remain abreast of the status of the case; and (3) be adequately prepared to handle the client's matter. 2002 FEO 5; Rule 1.1, cmt. [6]. The standards for record-keeping, including record retention, for electronic communications, documents, records, and other information ("records") are the same as the standards for paper records. As stated in 2002 FEO 5 on the retention of email in a client's file, "[a] lawyer must exercise his or her legal judgment when deciding what documents or information to retain in a client's file." Whether a lawyer should retain an electronic record that relates to a client's representation "depends upon the requirements of competent representation under the circumstances of the particular case." *Id.*

A lawyer must also exercise legal judgment, subject to the duty of competent representation, when deciding which format (electronic or paper) is the most appropriate for the retention of records generated during the representation of a client. 2002 FEO 5; *see also* RPC 234 (paper documents in client's file may be converted and saved in an electronic format if original documents with legal significance, such as wills, are stored in a safe place or returned to the client, and documents stored in electronic format can be reproduced in a paper format).

If an electronic record relative to a client's matter would be helpful to successor counsel, the electronic record is a part of the client's file. As explained in CPR 3, a client file does not include "the lawyer's personal notes and incomplete work product," or "preliminary drafts of legal instruments or other preliminary things which, unexplained, could place a lawyer in a bad light without furthering the interest of his former client." Therefore, a lawyer may omit from the records that are considered a part of the client's file the following: (1) email containing the client's name if the email is immaterial, represents incomplete work product, or would not be helpful to successor counsel; (2) drafting notes saved in preliminary versions of a filed pleading since these are incomplete work product; (3) notations or categorizations on documents stored in a discovery database since these are incomplete work product; and (4) other items that are associated with a particular client such as backups, voicemail recordings, and text messages unless the items would be helpful to successor counsel.

If the lawyer determines that an electronic record is a part of a client's file, then the lawyer has a duty to provide a copy of the record to the client upon the termination of the representation. Conversely, if the lawyer, in the exercise of legal judgment, determines that the electronic record is not a part of the client's file, then the lawyer is not required, but may, provide a copy of the electronic record to the client.

Inquiry #2:

Are lawyers required to organize or store electronic records relative to a specific client matter in any particular manner?

Opinion #2:

An organized record-keeping system designed to safeguard client information must include electronic records. *See* Opinion #1. The electronic records must be organized in a manner that can be searched and compiled as necessary for the representation of the client and for the release of the file to the client upon the termination of the representation. A document management system to track records by client and matter is recommended.

Because of the potential for electronic records to accumulate, one important aspect of an organized record-keeping system is a procedure for regularly exercising legal judgment as to whether to retain an electronic

record in the client's virtual file. Such a procedure would, for example, require the regular identification of emails that should be retained and made a part of the client's virtual file. Waiting until the representation has ended and the client has requested the file to identify electronic records that are a part of the client's file may increase the likelihood that an important electronic record will not be identified properly.

Inquiry #3:

When the representation terminates and the client requests the file, is the lawyer or law firm required to provide the records in the format (electronic or paper) requested by the client?

Opinion #3:

Many clients, or successor counsel, will have the technical expertise and financial ability to receive client records in an electronic format without experiencing any problem or undue expense in opening, using, or reproducing the records. These clients will probably prefer to receive the records in an electronic format. However, there are clients, such as individuals or small businesses with limited financial means or technical expertise, that cannot afford to purchase expensive software or computer equipment simply to gain access to the records in their own legal files. There must be a weighing of the interests of the lawyer or law firm in producing the client's file in an efficient and cost-effective manner against the client's interest in receiving the records in a format that will be useful to the client or successor counsel.

Therefore, records that are stored on paper may be copied and produced to the client in paper format if that is the most convenient or least expensive method for reproducing these records for the client. If converting paper records to an electronic format would be a more convenient or less expensive way to provide the records to the client, this is permissible if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense. Similarly, electronic records may be copied and provided to the client in an electronic format (they do not have to be converted to paper) if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense. *See* 2002 FEO 5 ("in light of the widespread availability of computers," emails may be provided to a departing client in an electronic format even if the client requests paper copies).

A lawyer should in most instances bear the reasonable costs of retrieving and producing electronic records for a departing client. However, a lawyer or law firm may charge a client the expense of providing electronic records if the client asks the lawyer or law firm to do any of the following: (1) convert electronic records from a format that is already accessible using widely used or inexpensive business software applications; (2) convert electronic records to a format that is not readily accessible using widely used or inexpensive business software applications; or (3) provide electronic records in a manner that is unduly expensive or burdensome.

Nevertheless, if the usefulness of an electronic record in a client file would be undermined if the document is provided to the client or successor counsel in a paper format, the record must be provided to the client in an electronic format unless the client requests otherwise. For example, providing a spreadsheet without the underlying formulas or providing a complex discovery database printed in streams of text on reams of paper would destroy the usefulness of such data to both the client and successor counsel.

Lawyers are encouraged to discuss with a client at the beginning of a representation the records that will be retained as a part of the client's file, and the format in which the records will be produced at the termination of the representation. ■

IOLTA Grantee Spotlight (cont.)

Legal Aid of NC and Lawyer on the Line—When the economic downturn forced LANC to lay off attorney staff at its Central Intake Unit (the statewide phone intake system established with support from IOLTA), they reorganized its operations as Call4All, a program implemented in partnership with the NC Bar Association Foundation. Intake is now handled by paralegals on staff to pre-screen clients (for eligibility and substantive problem information), and *pro bono* attorneys are recruited to provide advice and brief service. The NCBA provides recruitment, publicity, and recognition, and the NCBF Endowment has provided funding for one of the staff positions.

Recently renamed "Lawyer on the Line," this program provides an opportunity for private attorneys throughout the state to provide *pro bono* service to low-income persons by phone. Volunteers with Lawyer on the Line commit to one to four calls per month to Legal Aid screened and eligible clients, conduct one-hour telephone consultations with eligible LANC clients, and provide advice over the phone in a practice area of their choice at a time and location convenient for them. Legal Aid continues to provide malpractice insurance, a mentor, and training to volunteers. Areas of most need are: private landlord/tenant, public and subsidized housing, Medicaid, disability and non-disability issues in Social Security matters, consumer collections, employee rights, custody, guardianship, and simple estates.

The goal of recruiting 500 volunteers for this effort established by Martin Brinkley during his presidency of the NCBA in 2011-12 has been more than met. Over 750 volunteer lawyers (most new to *pro bono* work) have signed up and provided over 5,500 *pro bono* hours assisting just under 6,000 clients. Due to the overwhelming success of the program, Lawyer on the Line volunteers currently handle more than 38% of the cases that come in to LANC's Centralized Intake Unit, allowing LANC staff attorneys to spend their time on more complex cases, and significantly increasing the number of cases undertaken each year. LANC Director George Hausen notes, "Lawyer on the Line has allowed LANC to serve thousands of additional families while introducing hundreds of new volunteer lawyers to the importance of, and the satisfaction obtained by, doing *pro bono* work on behalf of the poor." ■

To volunteer for hotline or other pro bono service or to donate to legal aid visit ncaccesstojustice.com.

State Bar Swears in New Officers


Baker


Gibson


Hunt

Baker Installed as President

Kitty Hawk attorney Ronald G. Baker Sr. was sworn in as president of the North Carolina State Bar. He was sworn in by Chief Justice Sarah Parker at the State Bar's Annual Dinner on Thursday, October 24, 2013.

As an undergraduate, Baker attended the University of North Carolina as a Morehead Scholar, and he earned his JD with honors from the University of North Carolina School of Law.

Baker practiced with Henson, Donahue & Elrod in Greensboro from 1975-1978, then moved to Ahoskie and practiced with Baker, Jones, Daly & Carter, PA. He is now practicing in Kitty Hawk with the firm of Sharp, Michael, Graham & Baker, LLP.

Baker has substantial involvement in bar organizations. He is a member of the North Carolina Bar Association and the American Bar Association. He has served on the board and is past-president of the North Carolina Association of Defense Attorneys, and has been a North Carolina representative to the Defense Research Institute. As a State Bar councilor, Baker has chaired the Grievance Committee and Issues Committee. He has also served on the Client Assistance Committee, Authorized Practice Committee, Legislative Committee, Administrative Committee, Disciplinary Advisory Committee, Executive Committee, Program Evaluation Committee, Special Committee to Study Disciplinary Guidelines, and the Appointments Committee.

Mr. Baker is active in numerous civic organizations. He is a past-president and life member of the Ahoskie Jaycees, a US Jaycees ambassador, a former Hertford County commissioner, and past-chair of the Hertford County Board of Education and the Hertford County Committee of 100.

Gibson Elected President-Elect

Charlotte attorney Ronald L. Gibson was sworn in as president-elect of the North Carolina State Bar. He was sworn in by Chief Justice Sarah Parker at the State Bar's Annual Dinner on Thursday, October 24, 2013.

Gibson is a graduate of Davidson College. He earned his law degree in 1978 from the University of North Carolina School of Law.

His experience includes serving as a law clerk to US District Court Judge James B. McMillan, private law practice with Chambers, Stein, Ferguson & Becton, and service as associate general counsel and vice-president of marketing with Duke Power Company. He was also a principal with Scott, Madden & Associates, a management consulting firm. Gibson currently is a partner with the law firm of Ruff, Bond, Cobb, Wade & Bethune, LLP, and a member of the Board of Directors of Lawyers Mutual Insurance Company of North Carolina.

As a State Bar councilor, Gibson has served as chair of the Issues Committee and the Administrative Committee, and as vice chair of the Client Assistance Committee and Grievance Committee. He has also served on the Authorized Practice Committee, Executive Committee, Disciplinary Advisory Committee, Appointments Advisory Committee, Ethics Committee, Facilities Committee, and Program Evaluation Committee.

Hunt Elected Vice-President

Brevard attorney Margaret McDermott Hunt was sworn in as vice-president of the North Carolina State Bar. She was sworn in by Chief Justice Sarah Parker at the State Bar's Annual Dinner on Thursday, October 24, 2013.

Hunt is a graduate of the University of Maryland. She earned her law degree in 1975 from Wake Forest Law School. Since being admitted to the Bar that same year she has practiced law continuously in Brevard.

Her professional activities include service as president of the Transylvania County Bar, member of the State Bar's Continuing Legal Education Board, and member of the Chief Justice's Commission on Professionalism. While a councilor she has served as a member of the Grievance, Issues, Facilities, Legislative, Administrative and Executive Committees, and chaired the Administrative Committee, co-chaired the Program Evaluation Committee, served as vice-chair of the Grievance Committee for two years, and chaired the Grievance Committee in 2012-2013.

She was a founding member and served as secretary for the Transylvania Endowment, served as chair of the Transylvania County Chamber of Commerce, and was a member of the board of directors of Heart of Brevard and the Transylvania County Boys and Girls Club.

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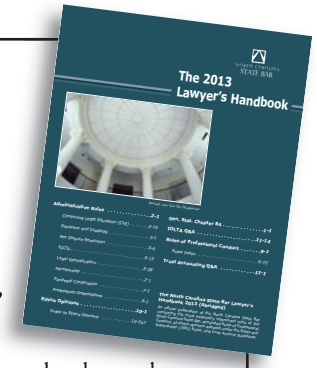

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Resolution of Appreciation of
M. Keith Kapp

WHEREAS, M. Keith Kapp was elected by his fellow lawyers from the 10th Judicial District in January 2001 to serve as their representative in this body. Thereafter, he was elected for three successive three-year terms as councilor; and

WHEREAS, in October 2010 Mr. Kapp was elected vice-president, and in October 2011 he was elected president-elect. On October 25, 2012, he was sworn in as president of the North Carolina State Bar; and

WHEREAS, during his service to the North Carolina State Bar, Mr. Kapp has served on the following committees: Grievance, Administrative, Emerging Issues, Issues, Executive, Disciplinary Review, Ethics, Paperless Banking, Facilities, Program Evaluation, Finance & Audit, and Appointments; and

WHEREAS, it is altogether fitting that the presidency of Keith Kapp has coincided with the completion and occupation of the North Carolina State Bar's new headquarters building since Mr. Kapp was one of the people most responsible for bringing that project to a successful conclusion. First, as chair of the Facilities Planning Committee and then as an officer of the council, Mr. Kapp did with determination, deftness, diplomacy, and decisiveness facilitate site acquisition, surmount bureaucratic obstacles, negotiate contractual disputes, and superintend the construction of a professional home for the lawyers of North Carolina that is surely unsurpassed among such facilities throughout the United States. All of this he managed with steadfastness of purpose, an ample measure of good humor, and the relentless optimism of a man who appreciates the fact that great things can be accomplished by taking two steps forward for every step back; and

WHEREAS, perceiving that there are challenges, stresses, and hardships that are disproportionately encountered by new lawyers and senior lawyers, Mr. Kapp wisely initiated a comprehensive examination of the means by which the North Carolina State Bar might reasonably and effectively exercise its regulatory authority to assist such practitioners and, by so doing, better protect the public. As a result of this regulatory introspection, Mr. Kapp facilitated the promulgation of several amendments to the State Bar's rules that should make it easier for older lawyers to retire with dignity, realize the value of their enterprise, and provide opportunity for a new generation of aspiring practitioners; and

WHEREAS, Mr. Kapp has, during his year as president, splendidly personified the State Bar as a party to significant litigation. In so doing, he has been at once a superb lawyer and an ideal client, bringing his vast legal expertise and experience to bear as a lawyer's lawyer and as one of North Carolina's most sophisticated consumers of legal services; and

WHEREAS, Keith Kapp has been the inspirational and trusted face of the North Carolina State Bar in dozens of places throughout the state of North Carolina during his year as president, appearing ubiquitously in person and in print. Investing extraordinary time and energy in meetings, in correspondence, in articles, and in proclamations, Keith Kapp has repeatedly put the profession's best foot forward as its most credible spokesman and its most dedicated servant.

NOW, THEREFORE, BE IT RESOLVED that the council of the North Carolina State Bar does hereby publicly and with deep appreciation acknowledge the strong, effective, and unselfish leadership of Keith Kapp, and expresses to him its debt for his personal service and dedication to the principles of integrity, trust, honesty, and fidelity.

BE IT FURTHER RESOLVED that a copy of this resolution be made a part of the minutes of the Annual Meeting of the North Carolina State Bar and that a copy be delivered to Keith Kapp.

Client Security Fund Reimburses Victims

At its October 24, 2013, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $255,588.04 to 12 applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of $100,000 to a former client of Leon Coxe III of Jacksonville. The board found that Coxe was retained to handle his paralegal's personal injury matter. From the settlement proceeds, Coxe took a fee, disbursed a small portion of the funds to the client, and embezzled the remaining funds to cover trust account shortages. Due to misappropriation, Coxe's trust account balance is insufficient to pay all of his clients' obligations. Coxe was disbarred on April 19, 2013.

2. An award of $725 to an applicant who suffered a loss caused by John Mauney of Kitty Hawk. The board found that Mauney was retained to handle two clients' real estate closings. Mauney's disbursement checks to the applicant bounced when the State Bar froze Mauney's trust account due to misappropriation. Mauney's trust account balance is insufficient to pay all of his clients' obligations. Mauney was disbarred October 31, 2013.

3. An award of $9,815 to a former client of John Mauney. The board found that Mauney was retained to handle a client's civil action. The client paid Mauney $10,000 to cover expenses in the case. Mauney used only $185 for expenses and misappropriated the balance.

4. An award of $405 to an applicant who suffered a loss caused by John Mauney. The board found that Mauney was retained to handle a client's real estate transaction. The commission check Mauney sent to one of the realtors failed to clear because the State Bar froze Mauney's trust account due to misappropriation.

5. An award of $2,225 to former clients of John Mauney. The board found that Mauney was retained to handle the clients' real estate closing. The disbursements from the closing proceeds failed to clear because Mauney's trust account was frozen by the State Bar due to misappropriation.

6. An award of $27,953.04 to former clients of Jason Price of Norwood. The board found that Price was retained to handle a client's real estate closing. Price retained a portion of the closing proceeds to pay off judgments against the seller and possibly negotiate a reduction in those judgments. Price failed to negotiate with the judgment creditors and failed to make the proper disbursements from the closing proceeds. Due to misappropriation, Price's trust account balance is insufficient to pay all of his clients' obligations. Price was disbarred on October 21, 2011.

7. An award of $10,000 to a former client of Nicholas Stratas Jr. of Raleigh. The board found that Stratas was retained to represent a client in a civil action. Stratas appropriated the retainer to his own use upon receipt, and failed to provide any valuable legal services for the fee paid. Stratas was disbarred on February 1, 2013. The board previously reimbursed nine other Stratas clients a total $142,215.78.

8. An award of $100,000 to a former client of Kevin Strickland of Burgaw. The board found that Strickland represented a client in the sale of a large tract of real property. Strickland was to retain the client's sale proceeds until the client could find similar land to purchase to complete a 1031 like-kind exchange. The client had trouble finding other similar land to purchase. Strickland advised the client that he was making a temporary investment of the client's sale proceeds in a real estate investment company, and that investment would satisfy the requirements of the 1031 exchange. Strickland was the manager of the real estate investment company and appropriated a portion the client's funds to his own use. The client later sold another piece of real property and asked Strickland to hold the sale proceeds for another 1031 like-kind exchange. Strickland misappropriated the proceeds from that sale. Due to misappropriation, Strickland's trust account balance is insufficient to pay all of his clients' obligations. Strickland was disbarred on December 31, 2008.

9. An award of $1,341 to a former client of R. Dannette Underwood of Clayton. The board found that Underwood was retained to file a client's petition for bankruptcy. Underwood failed to provide any valuable legal services for the fee paid. Underwood was disbarred on May 18, 2013. The board previously reimbursed one other Underwood client a total of $1,406.

10. An award of $1,000 to a former client of R. Dannette Underwood. The board found that Underwood was retained to file a client's petition for bankruptcy. Underwood filed a petition that was so ineffective that the court dismissed the petition and ordered Underwood to refund the fee to the client. Underwood failed to refund the unearned fee as ordered.

11. An award of $1,124 to a former client of R. Dannette Underwood. The board found that Underwood was retained to file a client's petition for bankruptcy. Underwood failed to provide any valuable legal services for the fee paid.

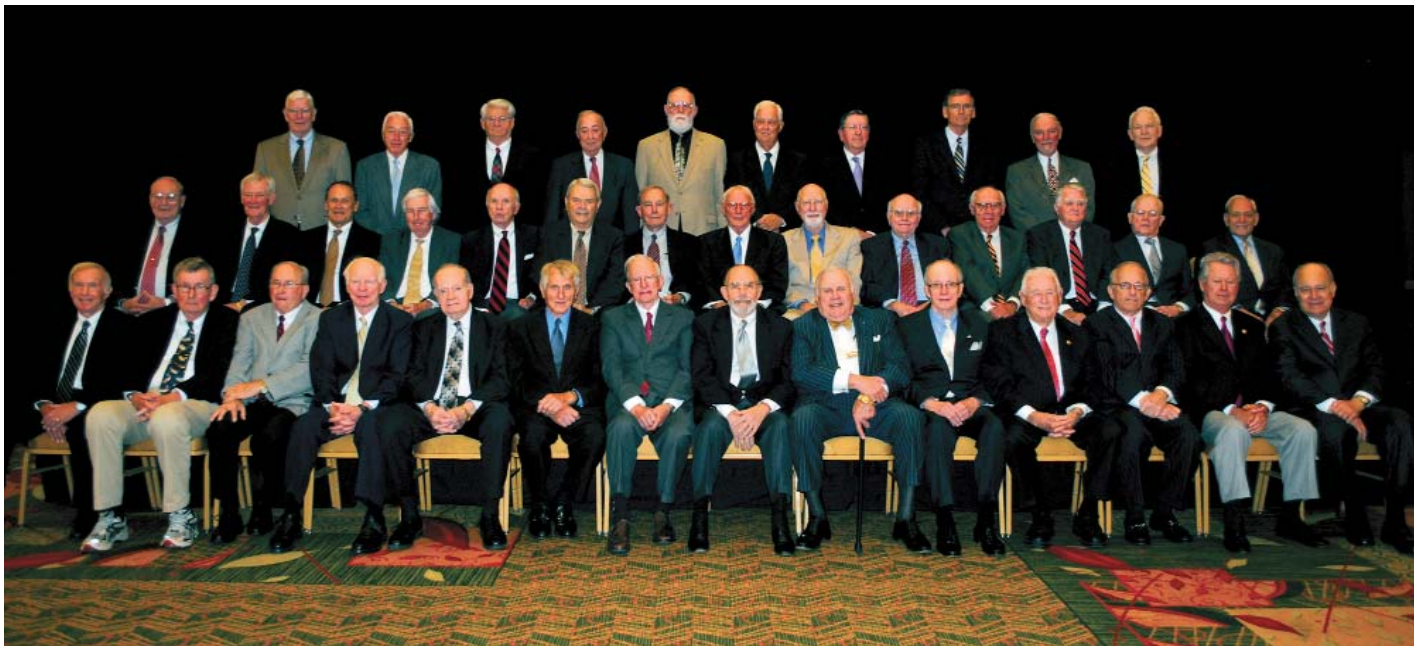
12. An award of $1,000 to a former client of Alexander H. Veazey III of Hendersonville. The board found that Veazey was retained to perform estate planning and property transfers for a client. Veazey failed to provide any valuable legal services for the fee paid. Veazey was transferred to disability inactive status on January 18, 2013. The board previously reimbursed one other Veazey client a total of $27,994.86. ■

Thank You to Our Meeting Sponsor

Thank you to Lawyers Mutual for sponsoring the Annual Reception and Dinner.

Fifty-Year Lawyers Honored

As is traditional, members of the North Carolina State Bar who are celebrating the 50th anniversary of their admission to practice were honored during the State Bar's Annual Meeting at the 50-Year Lawyers Luncheon. One of the honorees, Tony Hornthal, led a panel discussion that included Marvin Musselwhite, Judge Frank Bullock, Gene Edmundson, and Wade Smith, and each honoree was presented a certificate by the president of the State Bar, M. Keith Kapp, in recognition of his service. After the ceremonies were concluded, the honorees in attendance sat for the photograph below. ■



First row (left to right): Charles D. Gray III, Tarlton R. Thompson Jr., Edward M. Woodall, W. Herbert Brown Jr., W. Dan Herring, Howard G. Doyle, Robert L. Gunn, J. Harold Tharrington, Glen Stevenson Crihfield, J. Edgar Moore, John R. Hooten, J. Phillips L. Johnson, Joe McLeod, Norwood E. Bryan Jr. *Second row (left to right):* Otis M. Oliver, Marvin D. Musselwhite Jr., E. Lawrence Davis III, A. Ward McKeithen, Frank W. Bullock Jr., James M. Long, Louis P. Hornthal Jr., Wade M. Smith, Samuel S. Woodley Jr., James B. Rivenbark, Edwin R. Groce, Robert C. Hedrick, Benton H. Walton, Albert M. Salem Jr. *Third row (standing, left to right):* Forrest A. Ferrell, Eric A Jonas Sr., Fred A. Flowers, Ronald G. Edmundson, Jerry B. Grimes, Ashley L. Hogewood Jr., Richard M Lewis Jr., John L Holshouser Jr., Ralph A. Walker, Thomas H. Morris

Law School Briefs

All of the law schools located in North Carolina are invited to provide material for this column. Below are the submissions we received this quarter.

Campbell University School of Law

***Campbell Law Externship Program Ranked 27th Nationally by* The National Jurist**—A survey of law school externship programs in the September 2013 edition of *The National Jurist* found that Campbell Law School's program ranks 27th nationally for percentage of total student body participation in externships. Campbell Law ranked highest among the seven North Carolina law schools. Eighty-five percent of recent Campbell Law graduates completed one or more externships with corporate, government, non-profit, and *pro bono* private practice employers.

Campbell Law Holds Swearing-in Ceremony for Recent Graduates—Fifty graduates from the Campbell Law Class of 2013 participated in a swearing-in ceremony at the law school on Friday, September 13. The Honorable Paul Gessner, the Honorable Shannon Joseph, and the Honorable Paul Ridgeway, all North Carolina Superior Court Judges, administered the oath of office and led the swear-

ing-in of Campbell Law alums who recently passed the July 2013 North Carolina bar examination.

Campbell Law Establishes Honoratos Emeritus Scholarship for Military Veterans—Strengthening its already historically strong relationship with the military community, Campbell Law School has announced the establishment of the Honoratos Emeritus Scholarship. The scholarship will award any qualified veteran offered admission to Campbell Law an annual $15,000 renewable scholarship. For veterans that reside in North Carolina, the Honoratos Emeritus Scholarship essentially amounts to a full-tuition scholarship when combined with the G.I. Bill.

Dean Leonard Receives Carraway Award of Merit from Preservation NC—Campbell Law Dean J. Rich Leonard was presented with the Gertrude S. Carraway Award of Merit from Preservation North Carolina during the organization's annual conference on October 4 in Edenton, NC. Leonard received the honor in acknowledgement of his tireless work spearheading the restoration of the historic Century Station Federal Building on Fayetteville Street in Raleigh.

Charlotte School of Law

Open for Business in Uptown Charlotte—We have a new home in Charlotte Plaza at 201 South College Street. Students are closer to leading law, banking, and energy companies, Charlotte's seven Fortune 500 headquartered companies and potential future employers. The new location also improves access to county and federal courts and makes it easier for judges, lawyers, and business and community leaders to visit the school. The facility includes 243,000 total square feet with 17 classrooms, three moot court/classrooms, one training/classroom, one courtroom, and 38 study rooms.

CharlotteLaw Edge—Our new curriculum is grounded in real-world learning experiences, award-winning community service, and demonstrated success in preparing students for evolving and emerging market realities that today's graduates must navigate. In addition to legal theory, CharlotteLaw Edge emphasizes practical training in the skills and knowledge required to practice law, run a law practice, communicate with clients, and manage cases and transactions.

LL.M. in American Legal Studies—Charlotte School of Law is pleased to offer a LL.M. in American Legal Studies for foreign law graduates who have already received a primary law degree from universities in their home countries. The one-year, 24-credit Master of Laws degree offers students a choice of two tracks. The Flexible Track gives students great control over the substantive content of their LL.M. program through selection of a significant number of electives. The New York Track is designed to assist those students who wish to pursue admission to the New York State Bar upon obtaining their LL.M. degree by offering a curriculum focused on bar course requirements.

Judges from Nations of Africa Visit—Charlotte School of Law in conjunction with International House recently played host to seven judges and legal practitioners from countries in Africa. The group was here visiting Charlotte through the State Department International Visitors Leadership Program.

Duke Law School

Three Supreme Court Justices Address Duke Students—Supreme Court Associate Justices Samuel Alito and Clarence Thomas made separate visits to Duke Law during the fall semester. Each met with small groups of students and took part in a "Lives in the Law" interview with Dean David F. Levi before an overflow audience. Justice Alito spent a week at Duke, teaching a weeklong class titled Current Issues in Constitutional Interpretation for upper-year students. He has taught the class annually since 2009.

A wide-ranging conversation with Associate Justice Ruth Bader Ginsburg capped a July 19 reception in Washington, DC, celebrating the launch of the Duke DC Summer Institute on Law and Policy. Professor Neil Siegel, who directs the institute, led the conversation with Ginsburg for whom he clerked during the October 2003 term of the Court. Institute students and capital-area alumni attended the event.

Duke DC Summer Institute on Law and Policy has Successful Inaugural Season—More than 60 students enrolled in the short evening courses taught in Washington by Duke Law faculty on constitutional and regulatory law, the legislative process, and the legal framework in which public policy is formulated and implemented in such specific areas as national security, financial regulation, environment, and health care. Many of the students were congressional staffers and summer interns seeking a deeper understanding of specific matters of law and policy as well as a taste of law school.

Duke's Innocence Program Receives $250,000 DOJ Grant—Duke Law's Innocence Program, which includes the Wrongful Convictions Clinic and Innocence Project, ® has been awarded a $249,718 grant from the US Department of Justice. The grant from the Bureau of Justice Assistance in the DOJ's Office of Justice Programs will be used to advance the program's 19 current cases involving credible claims of innocence by North Carolina inmates.

Elon University School of Law

New JD/MBA Program—Offered with the Martha and Spencer Love School of Business at Elon University, the program enables students to earn JD and MBA degrees in four years and at lower cost than if both degrees were pursued separately. Students in the program will benefit from Elon's innovative approach to legal education, including its nationally recognized attorney-student mentoring program, as well as the strengths of Elon's MBA program, ranked the #1 part-time MBA program in the nation by *Bloomberg Businessweek*.

Expanded Externship Program—Elon Law's new Semester-in-Practice Externship Program allows students to participate in full-time, semester-long externships in nonprofit or government offices nationally or internationally. The new In-House Counsel Externship Program enables students to work in the offices of corporate counsel at for-profit organizations. Both programs enable students to obtain extensive professional legal experience while earning academic credit under the supervision of law school faculty. These programs build on the school's existing externship program, which offers students numerous placement opportunities in dozens of nonprofit organizations and state executive, legislative, and judicial branch offices.

Elon Law Review Publishes Issue on Civil Rights Lawyer Albion Tourgée—

Volume 5, Issue 1 of the *Elon Law Review* examines the life, views, and impacts of Albion Tourgée, the lead attorney for Homer Plessy in the historic United States Supreme Court case *Plessy v. Ferguson* (1896). Articles in this issue of the *Elon Law Review* were developed from a 2011 conference held in Raleigh titled, "A Radical Notion of Democracy: Law, Race, and Albion Tourgée, 1865-1905." Sponsors of that conference included Elon Law, NC Department of Cultural Resources, NC Institute for Constitutional Law, UNC Center for the Study of the American South, and UNC School of Law. Visit law.elon.edu/lawreview to download articles from this issue.

North Carolina Central University School of Law

Project Will Power—North Carolina Central University School of Law will participate in Project Will Power at Raleigh's Top Greene Community Center, in cooperation with Legal Aid of North Carolina and local volunteer lawyers. Robyn Hicks, NCCU Law Class of 2013, initiated the project in this low-income, southeast Raleigh community while still a student. Now in its third year, the Pro Bono Law Clinic serves dozens of clients in the completion of their wills and advance planning documents, such as health care and financial powers of attorney and living wills.

Last year 17 volunteer lawyers and more than 30 students participated. According to Pro Bono Program Director Page Potter, the students gain immeasurably from the experience: "They get to see their Wills and Estates class material come to life, gain practical experience in interviewing and drafting documents, and meet and work alongside practicing attorneys."

Potter explained that Legal Aid of Raleigh is so overwhelmed with urgent matters such as eviction and loss of food stamps or Medicaid that the organization cannot afford to commit resources to less acute concerns. Although most residents will not have large estates, everyone is at risk of catastrophic injury.

"If you're incapacitated, your son or daughter can't simply write checks from your account to cover your bills," said Potter. "Without a power of attorney, family members have to go to court to obtain guardianship, which is costly, inconvenient, and stressful at a time when they're already in crisis."

Project Will Power offers a way for law students and the private bar to augment Legal Aid's service to low-income clients through the Private Attorney Involvement program.

"The students report to me that their greatest takeaway from the experience was the satisfaction they felt in providing peace of mind to these families," said Potter.

University of North Carolina School of Law

Center for Civil Rights—The UNC Center for Civil Rights released the report, "The State of Exclusion," which illustrates the pockets of inequality throughout North Carolina in three areas: environmental justice, education, and housing. The chances that residents of these predominately non-white neighborhoods live within one mile of an environmental hazard, such as a landfill or incinerator, or that their closest school is failing or high-poverty, are almost double that of the state averages, according to the report. Learn more: uncinclusionproject.org.

US Court of Appeals—UNC School of Law hosted the US Court of Appeals for the Fourth Circuit September 20. In the law school's Graham Kenan Courtroom, the court heard oral arguments in two cases. Students and faculty were invited to join the audience, and crowds overflowed into an adjacent classroom where proceedings were livecast. In the evening, the law school hosted a reception honoring former law school dean and judge, J. Dickson Phillips, at the Carolina Inn.

Hornstein Featured in New Book on Top Law Profs.—A new book names Donald Hornstein, Aubrey L. Brooks Professor of Law, one of only 26 "best law teachers" in the country. The book, *What the Best Law Teachers Do* (Harvard University Press, 2013), is the culmination of a four-year study that sought to identify extraordinary law teachers. The study details the attributes and practices of professors who have a significant, positive, and long-term effect on their students.

US News—UNC School of Law was named one of the "10 Law Degrees with the Biggest Return on Investment," according to *US News & World Report* magazine in an August 13, 2013, article. UNC was also ranked No. 7 in *US News & World Report* magazine's list of "Highly Ranked Law Schools [That] Operate Most Efficiently."

Wake Forest University School of Law

Wake Forest Law Review members have created the first daily Fourth Circuit legal blog. The blog, Collecting Cases, is managed solely by members of the *Wake Forest Law Review*. Collecting Cases is dedicated to covering issues arising in the Fourth Circuit. The blog is updated daily by members of the *Law Review* with summaries of newly published opinions. Additionally, each week a contributor will provide a longer, more in-depth piece on a particularly noteworthy decision.

"We intend for it to serve as a resource for the broader legal community, and we hope that it provides another advertisement of the strength of Wake Forest Law's student body," Editor-in-Chief Lee Denton ('14) said.

Students can share links on LinkedIn, Facebook, or Twitter if they find a case summary particularly compelling. The blog can be found at wakeforestlawreview.com/category/collectingcases. For more information, contact the executive online editors Matt Meyers (meyemf11@wfu.edu) or Justin Philbeck (philjp11@wfu.edu).

Wake Forest Law Professor Michael Green is a member of the executive committee of the newly established World Tort Law Society. In his leadership role he attended the inaugural meeting of the society, which was held September 14-15 in Harbin, Heilongjiang Province, China. The meeting's theme was product liability.

The society, jointly founded by the institute with the European Centre of Tort and Insurance Law (ECTIL) and the Research Centre for Civil and Commercial Jurisprudence, Renmin University, Beijing, China, aims to provide a forum for the discussion of current tort law issues on a global basis.

The society has an invited membership of approximately 25 leading scholars from around the world. The first president of the society is Helmut Koziol (ECTIL). The society's Executive Committee consists of Yang Lixin (Renmin), Ken Oliphant (Institute for European Tort Law), and Professor Green. WANG Zhu (Sichuan University, China) acts as the committee's secretary. ■

John B. McMillan Distinguished Service Award

Samuel S. Woodley Jr. is a recipient of the John B. McMillan Distinguished Service Award. A native of Tyrrell County, Mr. Woodley earned his undergraduate degree from the University of North Carolina in 1961, and graduated with honors from UNC Law School in 1963. While at UNC Law School, Mr. Woodley was an editor on the *Law Review* and was selected for the Order of the Coif. After graduation he served as a JAG officer in the United States Air Force. After his service, Mr. Woodley returned to eastern North Carolina and began practicing with the law firm of Battle, Winslow, Scott & Wiley, PA in Rocky Mount, where he has practiced for over 40 years. Mr. Woodley is a past president of the North Carolina Association of Defense Attorneys, where he was honored with the J. Robert Elster Award for Professional Excellence. He was also the first North Carolina recipient of the Defense Research Institute's Louis B. Potter Lifetime Service Award. In addition to teaching at numerous CLEs throughout his career, Mr. Woodley has given back to the legal community by serving on the State Bar's Ethics Committee, the Bar Association's Bench-Bar Liaison Committee, and the North Carolina Board of Law Examiners. Mr. Woodley's promotion of ethical, professional, and courteous conduct among members of the bar, coupled with his *pro bono* work and service to the legal profession, make him a role model in eastern North Carolina and a deserving recipient of the John B. McMillan Distinguished Service Award.

Seeking Award Nominations

The John B. McMillan Distinguished Service Award honors current and retired members of the North Carolina State Bar who have demonstrated exemplary service to the legal profession. Awards will be presented in recipients' districts, with the State Bar councilor from the recipient's district introducing the recipient and presenting the certificate. Recipients will also be recognized in the *Journal* and honored at the State Bar's annual meeting in Raleigh.

Members of the bar are encouraged to nominate colleagues who have demonstrated outstanding service to the profession. The nomination form is available on the State Bar's website, ncbar.gov. Please direct questions to Peter Bolac at the State Bar office, (919) 828-4620. ■

2014 Appointments to Boards and Commissions

January Council Meeting

Lawyer Assistance Program Board (3-year terms) – There are three appointments to be made. Dr. Joseph P. Jordan and Robert E. Nunley are eligible for reappointment. Margaret J. McCreary is not eligible.

April Council Meeting

American Bar Association Delegates (2-year terms) – There are three appointments to be made. Barbara B. Weyher, Anthony S. di Santi, and James R. Fox are eligible for reappointment.

Disciplinary Hearing Commission (3-year terms) – There are four appointments to be made. Walter E. Brock and Joshua W. Willey Jr. are eligible for reappointment. Sharon B. Alexander and Harriett Smalls are not eligible for reappointment.

Grievance Resolution Board (4-year terms) – The council must make one recommendation to the governor for appointment to this board. Lucien Capone III is eligible for reappointment.

July Council Meeting

Board of Legal Specialization (3-year terms) – There are three appointments to be made. Judge Teresa H. Vincent and Dr. Priscilla P. Taylor (public member) are eligible for reappointment. James B. Angell is not eligible for reappointment.

IOLTA Board of Trustees (3-year terms) – There are three appointments to be made. John B. McMillan and Hope H. Connell are eligible for reappointment. Linda M. McGee is not eligible.

October Council Meeting

Client Security Fund Board of Trustees (5-year terms) – There is one appointment to be made. William O. King is not eligible for reappointment.

Board of Law Examiners (3-year terms) – There are three appointments to be made. Jaye P. Meyer and James R. Van Camp are eligible for reappointment. Roy W. Davis Jr. is not eligible for reappointment.

Board of Continuing Legal Education (3-year terms) – There are three appointments to be made. Edward P. Tewkesbury is eligible for reappointment. Marcia H. Armstrong and Susan H. Hargrove are not eligible for reappointment.

NC LEAF (1-year terms) – There is one appointment to be made. William R. Purcell is eligible for reappointment.

State Judicial Council (4-year terms) – There is one appointment to be made. Fred H. Moody Jr. is eligible for reappointment.

North Carolina Judicial Standards Commission (6-year terms) – There are two appointments to be made. L.P. Hornthal and William H. Jones Jr. are not eligible for reappointment.

Board of Paralegal Certification (3-year terms) – There are three appointments to be made. Teresa L. Bowling and Howard L. Gum are eligible for reappointment. Grace C. Ward (paralegal) is not eligible for reappointment.

Annual Reports of State Bar Boards

Board of Legal Specialization

Submitted by Jeri L. Whitfield, Chair

The specialization program continues to prosper and to fulfill its mission to assist the public by identifying qualified practitioners who are proficient in specialty areas and to improve the competency of the bar.

At the national level, North Carolina's specialization program is a recognized leader. We rank fifth among the state certification programs in total number of board certified specialists and rank fourth among the state programs in number of specialties offered to members of the bar. In addition, in August, Alice Mine, the director of our specialization program, was appointed chair of the ABA Standing Committee on Specialization, the leading national proponent of lawyer specialty certification. This is evidence of the high esteem in which Alice is held nationally. She is often a speaker at the ABA Roundtable on Specialization, and her wise counsel is sought by the directors of specialization in other states.

Here in North Carolina, the specialization program continues to grow. Last November the board certified 52 new specialists. There are currently 864 board certified specialists in the ten specialty areas of appellate practice, bankruptcy law, criminal law, elder law, estate planning and probate law, family law, immigration law, real property law, social security disability law, and workers' compensation law. In the spring we received 128 applications from lawyers seeking certification this year—this is a record number. Of these, 112 applicants met the substantial involvement, CLE, and peer review standards for certification and were approved to sit for a specialty exam.

There were 26 applications for the new specialty in trademark law. The Intellectual Property Law Section of the NC Bar Association applied to the board to create this new specialty, which was approved by the State Bar Council and the Supreme Court in early 2013. Matthew Ladenheim, of Trego, Hines & Ladenheim, PLLC, in Charlotte, chaired the trademark law specialty committee appointed by the board. Matthew led a dedicated committee of six other trademark lawyers through the time-consuming and intellectually challenging tasks of creating standards for the specialty and writing the trademark specialty exam, which was administered for the first time last week. The board is grateful to Matthew and the members of his committee for their exceptional dedication to writing an exemplary exam.

The Trademark Law Specialty Committee spent countless hours working with Dr. Terry Ackerman, a psychometrician and the associate dean of the School of Education at UNC Greensboro, to develop a valid and reliable specialty examination. Denise Mullen, the assistant director of the specialization program, has worked side-by-side with Dr. Ackerman for several years to assist the trademark committee, and the other specialty committees, with the exam development process. As a consequence, Denise has become the specialization program's own amateur psychometrician with unique knowledge of the science of designing and administering examinations. Her skills and knowledge in this area are of immense value to the program.

With the addition of five new specialties or subspecialties over the past seven years, offering 15 different exams on the same date is no longer administratively possible. This fall the specialization exams are being administered in the new State Bar headquarters on ten different days. Lanice Heidbrink, the administrative coordinator for the program, did an exceptional job of organizing and overseeing the numerous details required by multiple exam administrations. Being able to offer the exams on different dates in our own building improved the efficiency and security of the administration of the exams. We anticipate that it will also simplify the grading process for the specialty committees. It was a pleasure to have such a beautiful, comfortable, and convenient location in which to administer the specialty examinations. We are sure that the examinees left the building with a positive impression of their State Bar despite six hours of testing.

At the annual luncheon honoring 25-year and newly certified specialists in April in Raleigh, I had the honor of presenting the board's three special recognition awards named in honor of past chairs of the board. The Howard L. Gum Excellence in Committee Service Award was given to Robert A. Ponton, a board certified specialist in family law. The James E. Cross Leadership Award was presented to Judge John M. Tyson, a board certified specialist in real property law. The Sara H. Davis Excellence Award was presented to John W. Narron, a certified family law specialist, for excellence in his daily work as a lawyer and for serving as a model for other family lawyers.

Unfortunately, the term of public board member Dr. Allen Hayes ended this year. While serving on the board from 2007 to 2013, Dr. Hayes brought the perspective of the medical profession, where professional certification is well-established and accepted, to the board's deliberations. Dr. Hayes' contributions to the specialization program were unique and he will be missed.

We will also miss Matthew Martin, whose second term on the board ended this summer. Matthew's experience as a judge for the Cherokee Tribal Courts combined with his common sense, insight, and diplomacy made him the "go-to" person for every difficult or sensitive committee chairmanship including the chairmanship of numerous panels hearing appeals from denial of certification. Matthew is so important to the program that we cannot let him go: he is now chairing the Criminal Law Specialty Committee.

On behalf of the board, I want to expression my sincere appreciation to the members of the council for your continuing support of the specialty certification program.

Board of Continuing Legal Education

Submitted by Marcia Armstrong, Board Member

Lawyers continue to meet and exceed their mandatory CLE requirements. By mid-March 2013 the CLE department processed and filed over 24,000 annual report forms for the 2012 compliance year. I am pleased to report that 99% of the active members of the North Carolina State Bar complied with the mandatory CLE requirements for 2012. The report forms show that North Carolina

lawyers took a total of 341,036 hours of CLE in 2012, or 13 CLE hours on average per lawyer. This is one hour above the mandated 12 CLE hours per year.

The board continues to operate on a sound financial footing, supporting the administration of the CLE program from revenue from the attendee and non-compliance fees that it collects. The funds collected by the CLE program also help financially to support three programs that are fundamental to the administration of justice and the promotion of the professional conduct of lawyers in North Carolina. In 2013 the board used its surplus to contribute $127,125.00 to the operation of the Lawyers Assistance Program (LAP). At year end we estimate that another $43,708.00 will be distributed to the program. To date the board has collected and distributed $134,929.00 to support the work of the Equal Access to Justice Commission and $253,936.00 to support the work of the Chief Justice's Commission on Professionalism. The board has also collected $61,817.00 for the State Bar to cover the costs to administer the accounting and distribution of all of these funds.

This year the CLE Board proposed several amendments to the rules governing the program, including amendments to Rule .1602(c) and (d) to allow the accreditation of more technology programs, and an amendment to Rule .1604(e) to increase the number of CLE credits that may be fulfilled online from four to six per year. The board also proposed an amendment to Rule .1518(c) on the professionalism requirement for new admittees (PNA) to allow video replays and live webcasts.

The board strives to improve the program of mandatory continuing legal education for North Carolina lawyers. We welcome any recommendations or suggestions that councilors may have in this regard. On behalf of the other members of the board, I would like to thank you for the opportunity to contribute to the protection of the public by advancing the competency of North Carolina lawyers.

Board of Paralegal Certification

Submitted by G. Gray Wilson, Chair

The Board of Paralegal Certification accepted the first application for certification on July 1, 2005. Since that date, 6,490 applications have been received by the board, and I am proud to report that there are currently 4,289 North Carolina State Bar certified paralegals.

The board has administered the certification exam since May 2008. The exam consists of 150 multiple choice questions. It tests an applicant's knowledge of various legal subjects, including civil litigation; commercial law; criminal law; ethics; family law; legal research; real property; and wills, trusts, and estate administration. The exam requires an applicant to demonstrate that he or she possesses the skills necessary to provide competent assistance to lawyers including knowledge of communications, organization, documentation, analysis, and research. The exam is administered in April and October each year. During the last 12 months, the board certified 278 paralegals by exam.

A study guide for those preparing to take the certification exam—a long-standing project of the board—was completed this year. This study guide was authored by current board member Lisa M. Robinson, and past board members Marisa S. Campbell and Sharon L. Wall. Virginia M. Burrows, a past member of the Paralegal Certification Committee, edited the study guide. It is available at no charge on the website for the paralegal certification program, nccertifiedparalegal.gov.

The Paralegal Certification Committee writes the exam and is composed of seven hard working paralegals and paralegal educators. The terms of two inaugural members of the committee ended in March. On behalf of the board, I would like to recognize and thank these dedicated volunteers. Mary E. Willard, a paralegal for Bank of America, and Susan H. McIntyre, director of the paralegal program at Carteret Community College, were both instrumental to the committee's work for many years. We are also grateful for the volunteer service of the women who replaced Mary and Susan: Nell Wagner, a paralegal at Berger & Miller, LLP, in Raleigh, and Wendy Grode, the director of the paralegal studies program at Wilson Community College.

The board, on behalf of all State Bar certified paralegals, made the first and the largest single donation to the North Carolina State Bar Foundation, which provided funding for the new State Bar building. This donation was made possible by the enthusiastic endorsement of the paralegal certification program by paralegals from across the state. The board is currently working with regional and state paralegal organizations to plan an event for certified paralegals in the new State Bar building. The board is looking forward to thanking the certified paralegals for making and keeping the certification program an important and successful program of the North Carolina State Bar.

Lawyer Assistance Program

Submitted by Robynn Moraites

Message from the Director

The LAP has undergone unprecedented change in the past two years. We have seen the retirement of both Don Carroll and Ed Ward as well as the loss of a key administrative staff member, Buffy Holt. All are greatly missed. We have worked to rebrand the program with a new logo and consolidated message. We have begun updating the technological infrastructure of the office to allow easier communication with stakeholders and easier data collection and compilation. But the changes we have seen are not only on the "back end" office side.

In terms of clients we serve, in addition to the increase in the sheer number of cases, we have seen more of a trend with mental health cases, more complex cases with multiple issues occurring in the same individual, and serious impairments due to the overprescription, overuse, and combined use of prescribed medications. And, of course, we are seeing more cases resulting from the prolonged economic downturn.

Although alcoholism and addiction are critical, ongoing problems, we are seeing more cases of bipolar disorder, suicide attempts, and, tragically, more frequent occurrences of successful suicides. We are also finding many more lawyers experiencing serious career issues, unemployment, foreclosure, bankruptcy, and the attending mental health issues stemming from such extreme financial stress. It is not uncommon for us to work with a lawyer who has no permanent place to live, is severely depressed and is somehow still managing to practice law out of a car with a smartphone and a laptop. We have had to refer more lawyers to free, county-based crisis assistance than ever before in our history. Some days, the LAP office feels more like a triage unit at an ER than anything else.

These days, many, if not most, who seek our services do not have health insurance or the ability to pay for treatment services beyond what the LAP can offer. Still others are working longer than planned because they do not have the financial means to retire, leading to what we think of as older adult issues including medical problems that affect cognitive ability and some cases of dementia.

What is LAP doing to address these changing times? We are doing the best we can. Our clinically-trained staff members are able to assess, refer, and provide brief counseling. We have free, facilitated support groups that meet around the state. More than ever before we depend upon our volunteers to willingly provide CLE talks, an initial approach and intervention with lawyers in crisis, and ongoing personal peer support to LAP clients who are struggling with a myriad of issues. To ensure our volunteers are able to respond to these changing trends, we have begun offering more in-depth volunteer training and offering training for new volunteers more frequently.

In good news, lawyers who reach out to our program and follow our suggestions become the most emotionally resilient, happiest, and balanced lawyers in the state. We at LAP have been fortunate to witness countless lives transformed as well as the resulting community and fellowship that has emerged out of this shared journey of personal transformation. Amazing things are possible when one lawyer shares experience, strength, and hope with another. For this reason, our outreach efforts must remain a top priority in the coming years.

—Robynn Moraites

Confidentiality is the Cornerstone of LAP

All client interactions with LAP are held in strict confidence as are any referrals. The only exception is if an individual signs a release of information and asks LAP to report on his or her behalf to another organization or individual. Confidentiality is guaranteed by Rule 1.6(c).

Year in Review

Now in its 34th year of operation, NC LAP is busier than ever. NC LAP typically fields anywhere from five to ten "new inquiry or concern" calls a week in each of its Charlotte and Raleigh offices, totaling approximately 600-800 telephone calls a year, from impaired attorneys, judges, or law students, or concerned family members, managing partners, and colleagues. Of these calls this year, 131 resulted in newly opened files, with 15 additional files reopened, bringing the total number of cases opened in 2013 to 146. We closed 127 files resulting in a total of 653 total open cases for the program.

Many of the calls that do not result in the opening of a new file include situations where a lawyer or a judge calls seeking guidance for next best steps. For example:

• An older lawyer may need to wind down a practice and the judge or lawyer who is concerned does not know how to approach the individual or what to say. We coach them and eventually become directly involved if needed, but we typically do not open a file.

• A Bar councilor, judge, or lawyer may call to ask for guidance about a certain lawyer or situation without giving us the name of the lawyer at issue. We will often coach the caller through that situation and/or provide some referral resources.

• A lawyer has a child (ranging from teen to middle-aged) who has an impairment requiring treatment and needs a referral for a treatment center or local mental health provider.

• Lawyers sometimes call for treatment center recommendations for their own clients who appear to be impaired professionals (like doctors, nurses, pilots, etc).

• A lawyer who attended a CLE where there was a LAP presentation is seeking a recommendation of a therapist in his or her local area, but where it is clear there is not a need for full LAP involvement or case management.

Referral Sources

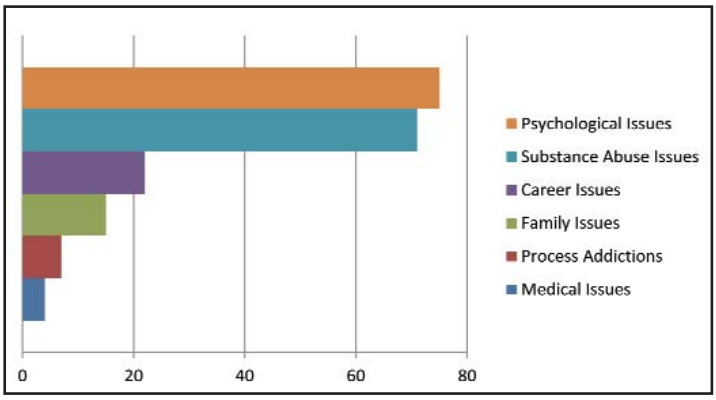
The rate of self-referral to LAP remains steady at 47%. Approximately 42% of LAP referrals come from colleagues, law firms, friends, family, and judges who have expressed concern about a lawyer or judge. The remaining 11% of referrals come from law schools, the Board of Law Examiners, other LAPs, therapists, physicians, or from the grievance process.

Gender

The gender breakdown for clients seeking services in 2013 was 67% men and 33% women.

Issues

Please see the graph detailing the issues we are seeing. Many clients exhibit problems in more than one category, so there is overlap in documenting the issues. We continue to see psychological problems more often than other issues and these frequently coexist with substance abuse issues. Some issues, like codependency, appear across the spectrum and could fit within multiple categories. For simplicity we have grouped codependency with family issues, although it certainly will affect a lawyer's happiness and satisfaction in his or her career and could also be categorized as a psychological issue that often leads to anxiety and depression. Although lawyers rarely come to us with only career-related issues, many describe their job-related concerns that exist along with depression, anxiety, and problem drinking. The term "process addiction" refers to compulsive behaviors such as problem gambling, eating disorders, compulsive spending, or sexual addiction including overuse of internet for sexual reasons.



CLE and Outreach

The best intervention always begins with education. In addition to our four quarterly articles appearing in the State Bar *Journal*, the LAP continues to provide CLE presentations for law firms, local and specialty bar associations, district bars, government agencies, and legal organizations to satisfy the substance abuse/mental health CLE requirement. In addition to the standard CLE we provide, LAP had two additional and somewhat unique outreach efforts this year.

Minority Outreach Conference

One of the highlights of 2013 was the very successful Minority Outreach Conference held in Chapel Hill on February 15, 2013. In its third year, the conference's goal is to reach out to minority members of the bar. Historically, LAP has been underutilized by African American attorneys. The conference provides an opportunity to explore themes related to practice unique to African American attorneys and to dispel myths about the LAP and how it

works. We reached registration capacity with 250 African American attorneys in attendance and an additional 60 on a wait list.

The conference this year brought together African American leaders within the profession to "examine the role of race in legal practice with an examination of normal, human responses to the anxiety and stress inherent in the practice of law today." Former Chief Justice Henry Frye delivered the keynote address and also participated in a roundtable discussion with highly-distinguished leaders and members of the North Carolina Bar, including the Honorable Wanda Bryant, NC State Bar Vice-President Ron Gibson, former Bar Councilor Victor Boone, Mecklenburg Bar President Rob Harrington, UNC Vice Chancellor for Student Affairs Winston Crisp, and Professor Fred Williams.

Recognizing the impact that chronic, prolonged stress has on the lives of attorneys, two dynamic speakers, Dr. James Smith and Dr. Michael Hall, addressed this emerging issue and ways of dealing with it. The event concluded with uplifting personal stories from recovering African American attorneys who are today serving as beacons of hope to others.

UNC School of Government

The UNC School of Government Indigent Defense Services Division asked Robynn Moraites to record an online CLE for perpetual use via the UNC website. It can be accessed at sog.unc.edu/node/2629. It may be viewed free of charge by anyone. If a lawyer is seeking CLE credit, the UNC School of Government charges a nominal fee.

Substance Abuse and Mental Health Presentations

Although we can tailor any program to specific needs or audiences, our most popular educational programs are:

• Getting Lost in Our Own Lives (focus is on preventive work-life balance and inherent stress of the profession)

• Compassion Fatigue: The Effects of Extended Exposure to Trauma and Drama in the Courtroom

• Mentally Preparing for Life's Transitions – the Psychology of Change (focused on the emotional impact of preparing for retirement)

• Addiction Basics and the Lawyer Assistance Program

In addition, we often receive requests for video presentations using our LAP History DVD or our Lawyer Risk and Resiliency DVD. These DVDs qualify for CLE credit and we can send you a copy if you are interested in showing either of these DVDs as a CLE offering.

The LAP presented at least 59 CLE programs this year. Occasionally our volunteers are asked directly to speak at a CLE in addition to the requests that formally come through our office, and we do not necessarily receive that information for statistical reporting purposes. We invariably receive at least one call or referral following every CLE we give.

Volunteers

Volunteers are the foundation of NC LAP. Our trained volunteers provide peer support to lawyers in need and they serve on informal intervention teams to help those lawyers and judges who may not realize they have a problem. LAP volunteers also serve as CLE speakers who help educate the legal profession about substance abuse and mental health problems.

LAP has volunteer opportunities for lawyers and judges (1) who themselves are in recovery from alcoholism or other substance abuse issues, depression, anxiety, or other mental health problems, or (2) who have experienced a family member or friend who has suffered from alcoholism or other substance abuse issues, depression, anxiety, or other mental health problems and who had to learn how to effectively deal with that situation.

All LAP volunteers receive formal and informal training from LAP staff. Volunteers are individually selected to be paired with clients based upon the facts and circumstances of their experience and that of the lawyer who is of concern.

We currently have 234 LAP volunteers. As described, the LAP network of volunteers and lawyer support groups provide a major part of the assistance given by the LAP to lawyers around the state. Without the extended volunteer network, it would be impossible for the LAP to be as effective as it has been during the past year.

LAP Steering Committee

With the consolidation of the PALS and FRIENDS programs into one unified LAP program, we invited some of our most active and dedicated volunteers from each of those programs to join the newly-formed LAP Steering Committee. We selected volunteers from each of the PALS and FRIENDS support groups around the state, as well as two members at large from each geographic region. The goal was broad and diverse representation. The LAP Steering Committee is a leadership committee dedicated to tackling specific initiatives deemed important by that committee to the continued success of the LAP.

The LAP Steering Committee selected three major initiatives to begin this year:

1) Creation of an electronic quarterly newsletter and blog as an outreach tool,

2) A law school initiative, with the goal being to establish formal programs in every law school for consistent annual outreach to all NC law students, and

3) Resumption of a 12-step study retreat weekend (not paid for by LAP, but self-supporting through paid registrations of participants) that had not been held in recent years.

The LAP Steering Committee has gotten off to a great start and we look forward to its continued visionary process and success.

Local Volunteer Meetings

The LAP continues the development of local volunteer meetings to provide greater continuity and support in meeting the needs of lawyers new in recovery and allowing volunteers the chance to grow in their own recoveries. Details on meeting locations are available on the LAP website, nclap.org.

Staff

Ed Ward retired as clinical director on July 31, 2013. At the time of this report, finalist candidates are being interviewed to replace Mr. Ward in covering the eastern region.

Buffy Holt, who was the office administrator for the Charlotte office for seven years, resigned her position. Katherine "Susie" Taylor, who previously worked as the associate executive director at the Mecklenburg County Bar and as a paralegal, has replaced Buffy as the new LAP special projects manager and CLE coordinator. There were no other changes in the LAP staff which remains: Robynn Moraites, executive director; Towanda Garner, Piedmont clinical coordinator; Cathy Killian, western clinical coordinator, and Joan Renken, Raleigh office administrator.

LAP Board

David W. Long, Chair; Kathy Klotzberger, Vice Chair; Christopher Budnick; Jerry Jernigan; Darrin Jordan; Dr. Joseph Jordan; Mardie McCreary; Dr. Nena Lekwauwua; and Robert "Bert" Nunley.

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February 2014 Bar Exam Applicants

The February 2014 bar examination will be held in Raleigh on February 25 and 26, 2014. Published below are the names of the applicants whose applications were received on or before October 31, 2013. Members are requested to examine it and notify the board in a signed letter of any information which might influence the board in considering the general fitness of any applicant for admission. Correspondence should be directed to Lee A. Vlahos, Executive Director, Board of Law Examiners, 5510 Six Forks Rd., Suite 300, Raleigh, NC 27609.

Amanda Abbott
Henderson, NC
Benjamin Able
Saluda, SC
Charles Adkins
Huntersville, NC
Randi Adkins-Warren
Atlanta, GA
David Ahlers
Hickory, NC
Jabeen Ahmad
Cary, NC
Megan Albaugh
Fayetteville, NC
Dawnwin Allen
Charlotte, NC
Kaushal Amin
Raleigh, NC
Robert Anderson
Charlotte, NC
William Anderson
Raleigh, NC
Robert Andrews
Washington, DC
Brett Anthony
Clayton, NC
Eric Applefield
Charlotte, NC
Jessica Armentrout
Thomasville, NC
Erik Armstrong
Durham, NC
Jane Atmatzidis
Durham, NC
Patrick Austin
Virginia Beach, VA
Allison Avent
Charlotte, NC
Jaha Avery
Raleigh, NC
Laura Azarelo
Garner, NC
Lauren Bailey
Charlotte, NC
Jonathan Bain
Kinston, NC
Jillian Ballard
Weaverville, NC
Zhen Bao
Durham, NC
Erica Barker
Bloomingdale, NJ
Lani Barnes
Mooresville, NC
Brittany Barrient
New York, NY
James Bartorelli
High Point, NC
Buki Baruwa
Charlotte, NC
Lacey Beam
Kings Mountain, NC
Jackson Bebber
Arden, NC
Matthew Beck
Willow Spring, NC
Cristina Becker Ellis
Charlotte, NC
Jeramick Bell
Greensboro, NC
Indeg Berdusis
New Orleans, LA
Christine Bergman
Greensboro, NC
Patrick Blair
Oak Ridge, NC
Fernando Bleichner
Charlotte, NC
Erin Blondel
Washington, DC
Darren Blum
Asheville, NC
Marvilyn Bohannan
Mebane, NC
Amanda Bolton-Hartsell
Kure Beach, NC
Jocelyn Bolton-Wilson
Cary, NC
Ashley Bonomini
Charlotte, NC
Catherine Booher
Greensboro, NC
Gary Bowers
Lexington, NC
Walter Bowers
Harrisburg, NC
Michael Bowlin
Charlotte, NC
James Brandhorst
Wilmington, NC
Anna Brinkley
Raleigh, NC
Dana Brinkley
Cary, NC
Aries Brinson
Goldsboro, NC
Kevin Brockenbrough
Raleigh, NC
Margaret Brooks
Charlotte, NC
Alexander Brown
Charlotte, NC
Ashley Brown
Ridgeland, SC
Brittany Brown
Raleigh, NC
Samantha Brown
Fayetteville, NC
Susan Brown
Greensboro, NC
Chad Buckingham
Charlotte, NC
Kathryn Buckner
Greensboro, NC
Kate Bullock
Lumberton, NC
Sarah Burris
Charlotte, NC
Alaina Byrd
Charlotte, NC
Amanda Byrum
Monroe, NC
Anil Caleb
Fayetteville, NC
Hayne Caliva
Fort Bragg, NC
Casey Calloway
Charlotte, NC
Brian Calub
Charlotte, NC
Ashley Cameron
Mount Holly, NC
Andrew Cappelletti
Chapel Hill, NC
Darren Caputo
St. Petersburg, FL
James Cartner
Statesville, NC
Philip Casey
Charlotte, NC
Leslie Casse
Asheville, NC
Katherine Chanas
Winston Salem, NC
Kaley Childs
Greensboro, NC
JeongYeong Cho
Raleigh, NC
Heeyoon Choi
Winston-Salem, NC
John Choi
Hendersonville, NC
Shinjin Choi
Mint Hill, NC
Melanie Clayton
Raleigh, NC
Sean Clayton
Charlotte, NC
Crawford Cleveland III
Charlotte, NC
Edward Cole
Jacksonville, FL
Jeremy Collins
Durham, NC
Pamela Collins
Durham, NC
Jennifer Comrey
Charlotte, NC
Tamira Conner
Durham, NC
Ebony Connor
Nashville, TN
Helen Cooper
Stamford, CT
Michael Cooper
North Wilkesboro, NC
Bethany Corbin
Mooresville, NC
Generra Cornwell
Charlotte, NC
Kate Cosner
Traphill, NC
Nikki Costa
Morgantown, WV
Ron Cowart
Charlotte, NC
Jena Craft
Concord, NC
Robert Cratch
Greensboro, NC
James Craven
Winston-Salem, NC
Melanie Creech
Charlotte, NC
Benjamin Crissman
Greensboro, NC
Thadeus Culley
Hillsborough, NC
Jessica Culver
Greensboro, NC
William Cushing
Cary, NC
Stephen Dalton
Brevard, NC
Benjamin Dangerfield
Greenville, SC
James Daniel
Glen Allen, VA
Andrea Daniel-Canegata
Raleigh, NC
DeLisa Daniels
Greensboro, NC
Molly Daniel-Springs
Charlotte, NC
Michelle Davila
Jacksonville, NC
Christa Davis
Winston Salem, NC
Jennifer Davis
Houston, TX
Kendra Davis
Winston Salem, NC
Marque Debnam
Youngsville, NC
Tiyesha DeCosta
Charlotte, NC
Rohit Deedwania
Raleigh, NC
Shannon DeJesus
Burnsville, NC
Hannah Dell
Charlotte, NC
John DeMasi
Chapel Hill, NC
Michael Dennis
Jamestown, NC
Buck Denton
Richmond, VA
James Devine
Cherryville, NC
Evan DeWandler
Asheville, NY
Jason Diamond
Asheville, NC
Rhonda Diamond
Asheville, NC
Aurora Diaz
Durham, NC
Christopher Diaz
Charlotte, NC
Amber Dillon
Charlotte, NC
Andrew Dillon
Charlotte, NC
Stephen Dimpsey
Raleigh, NC
Greg Dixon
Elizabeth City, NC
Kathy Dixon
Statesville, NC
Monica Dongre
Cornelius, NC
Carolyn Donohue
Charlotte, NC
Zenobia Drammeh
Charlotte, NC
Paul Dubbeling
Hillsborough, NC
Laura Dugan
Charlotte, NC
Melinda Dugas
Bunker Hill, WV
Karen Dula
Charlotte, NC
Dara Duncan
Los Angeles, CA
Sally Duncan
Greensboro, NC
William Duncan
Columbia, SC

Jordan Dupuis
Huntersville, NC
Andrew Eckstine
Charlotte, NC
Howard Edwards
Shelby, NC
Emily Ehlers
Iowa City, IA
Megan Eigenbrot
Columbia, SC
Lee Ellenburg
Topsail beach, NC
Courtney Elliott
Greenville, NC
Lauren Ellisberg
Raleigh, NC
Rbecca Eng
Asheboro, NC
Dwight Ensley
Greensboro, NC
Kolby Epley
Charleston, SC
Jennifer Errington
Charlotte, NC
Evan Erwin
Fort Lauderdale, FL
Jacqueline Erwin
Fort Lauderdale, FL
Jesse Eshkol
Charlotte, NC
Tabitha Etheridge
Whiteville, NC
Delicia Evans
Raleigh, NC
Meisha Evans
Chapel Hill, NC
Elizabeth Everett
Baton Rouge, LA
Jared Fawley
Charlotte, NC
Amanda Feder
Summerfield, NC
John Feder
Summerfield, NC
Willie Fennell
Greensboro, NC
Nicholas Fernez
Wilmington, NC
Alexia Figueiredo
Charlotte, NC
Michael Fischer
Atlanta, GA
Kara Fletcher
Statesville, NC
Raquel Foriest
Winston Salem, NC
Josheda Forrester
Raleigh, NC
Catherine Frederick
Morrisville, NC
Alexander French
Charlotte, NC
Marilyn Fuller
Gibsonville, NC
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Charlotte, NC
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Goldsboro, NC
Stuart Gaylord-Scott
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Fayetteville, NC
Leslie Gibbons
Washington, DC
Eleanor Gilbert
Raleigh, NC
Dustin Gill
Hillsborough, NC
Kimberly Gill
Lansing, MI
Robert Gilligan
Waynesville, NC
William Gilmore
Raleigh, NC
Christian Glista
Charlotte, NC
Brendan Godin
Charlotte, NC
Irene Golding
Indian Land, SC
Madeline Gould
Charlotte, NC
Scott Graber
Arlington, VA
Kathryn Graham
Durham, NC
Marisa Grant
Raleigh, NC
Natalie Gray
Arlington, VA
Courtney Green
Charlotte, NC
Ebony Green
Durham, NC
Misty Greene
Morrisville, NC
Elisa Greenwood
Asheville, NC
Robyn Guinn
Raleigh, NC
Melissa Gurney
Rock Hill, SC
Shauna Guyton
Apex, NC
Gloria Gyamfi
Charlotte, NC
Brandy Hagler
Charlotte, NC
Hellina Hailu
Morrisville, NC
Thomas Haislip
Sanford, NC
Berenice Hale
Raleigh, NC
Brandon Hale
Stedman, NC
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Charlotte, NC
Kiara Harlow
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Jacob Harper
Wake Forest, NC
A'twar Harris
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Taylor Hastings
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Eric Hawkins
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Charlotte, NC
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Arlington, VA
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Erika Hunter
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Aberdeen, NC
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Fletcher, NC
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Pilot Mountain, NC
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Hamilton, MI
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Hilary Johnson
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Robbins, NC
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Elizabeth Kalua
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Charles King
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Rachel Langlois
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Winston-Salem, NC
Javan Lapp
Fletcher, NC
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Los Angeles, CA
George Laughrun
Charlotte, NC
Jonathan Law
Durham, NC
Brian Lawler
Greenville, SC
Tyrone Leader
Concord, NC
Christopher Lee
Wilmington, DE
Kelsey Lee
Huntersville, NC
Kyu-Eun Lee
Cary, NC
Mary Lee
Cary, NC
Seung-Hyun Lee
Goyang city, Kyung-Ki,
Justin Lefkowitz
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Tiffany Legette
Latta, SC
Christa Leggette
Fayetteville, NC
Todd Leverette
Greensboro, NC
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El Paso, TX
Lois Lewis
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ThienTrang Lieng
Apex, NC
Charles Lifford Jr
Gastonia, NC
Rebecca Lindensmith
Charlotte, NC
Elizabeth Linzan
Charlotte, NC
Michael Litrenta
Key West, FL
Thomas Liu
Chapel Hill, NC
Stephanie Livers
Charlotte, NC
Charity Loftis
Timberlake, NC
Jonathan Lovejoy
Raleigh, NC
Michael Lovejoy
Raleigh, NC
Jonathan Lucas
Durham, NC
Allison Luke
Asheville, NC
Eric Maddox
Deland, FL
Christian Mahn
Gastonia, NC
Jennifer Malm
Charlotte, NC
Steven Mange
Raleigh, NC
John Manzo
Southern Pines, NC
Jennifer Marshall
Sneads Ferry, NC
Joseph Martinez

Valdese, NC
David Mason
Dallas, TX
LaShonda Maxfield
Morrisville, NC
Laurel Maynard
Charlotte, NC
Tyler Mays
Matthews, NC
Jack McCaffery
Charlotte, NC
Colin McCormick
Asheville, NC
Jacob McDonald
Weaverville, NC
Andrew McDuffy
Hendersonville, NC
Megan McGee
Charlotte, NC
Catherine McKee
Greensboro, NC
Spenser McNeill
Rockingham, NC
Lawrence McPhail
Durham, NC
Michael McPheeters
Eden, NC
Michael Messick
Statesville, NC
Jessica Metz
Charlotte, NC
Margaret Miller
Beavercreek, OH
Shalonda Miller
Pikesville, MD
Franklin Milner
Cary, NC
Dawn Mitchell
Clemmons, NC
Samantha Mobley
Charlotte, NC
Matthew Mollozzi
Washington, DC
Nicholas Mooney
Tampa, FL
Martin Moore
Cockeysville, MD
Shalewa Moore
Charlotte, NC
ShMyra Moore
Salisbury, NC
Tracy Moore
Goldsboro, NC
Lisa Moorehead
Charlotte, NC
Erin Moorman
Highlands, NC
Jennifer Morgan
Charlotte, NC
Nathan Morgan
Durham, NC
Kelly Morrow
Charleston, SC
Stephanie Moser
Jacksonville, NC
Jerry Murphy
Tyler, TX
Michael Murphy
Raleigh, NC
Talicia Neal
Charlotte, NC
Curtina NeSmith
Charlotte, NC
Joseph Nett
Chapel Hill, NC
Paolo Newman
Charlotte, NC
Russell Newton
Charlotte, NC
Bethany Niebauer
Davidson, NC
Denise Noble
Raleigh, NC
Jessica Norton
Maxton, NC
Travis Norton
Durham, NC
Christopher O'Brien
Charlotte, NC
Colin O'Dawe
Virginia Beach, VA
Yoko Onishi
Yokohama,
Ilona Ori
Durham, NC
Brittany O'Shea
Charlotte, NC
Trevor Ostbye
Chapel Hill, NC
Chelsea Overs
Charlotte, NC
Thomas Page
Andrews, NC
Matthew Pagett
Raleigh, NC
Allison Parker
Swansboro, NC
John Pegg
Raleigh, NC
Douglas Penner
Virginia Beach, VA
Adam Peoples
Asheville, NC
Seth Percy
Cary, NC
Seleste Perez
Charlotte, NC
Adam Peters
Beulaville, NC
Bethany Peters
High Point, NC
Josepine Peters
Beaver, WV
Kelsey Petrosky
Live Oak, TX
Melanie Phillips
Raleigh, NC
Sharon Phillips
Forest City, NC
Jason Pikler
Greensboro, NC
Blanca Pilgrim
Raleigh, NC
Cody Pilon
Greensboro, NC
Matthew Poindexter
Durham, NC
Frederick Poisson III
Durham, NC
Andrew Price
Charlotte, NC
Haley Price
Danville, VA
Trina Pridgeon
Greensboro, NC
Alexis Pugh
Charlotte, NC
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Annual Reports (cont.)

LAP Board Meeting for 2014

LAP Board meetings are usually scheduled for lunchtime on Wednesday of the week the Bar Council meets except in October, when the LAP Board meets at the Annual LAP Meeting and Conference held the first weekend in November. The upcoming schedule is as follows:

January 21-24 - NC State Bar Headquarters

April 22-25 - NC State Bar Headquarters

July 22-25 - Doubletree by Hilton, New Bern

November 7-9 – Holiday Inn SunSpree Resort, Wrightsville Beach

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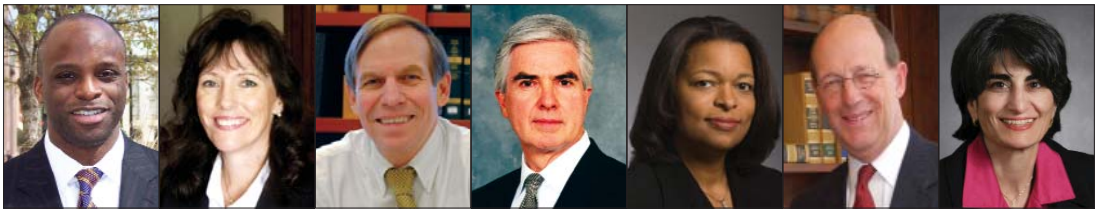

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